In the Supreme Court

OF THE

United States

OCTOBER TERM, 1963

No. 446

INDEPENDENT IRON WORKS, INC., a corporation,

Petitioner,

vs.

UNITED STATES STEEL CORP., BETHLEHEM PACIFIC COAST STEEL CORP., BETHLEHEM STEEL CO., KAISER STEEL CORP.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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Independent Iron Works, Inc., a corporation, by its attorneys, respectfully petitions that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on July 16, 1963.

OPINION BELOW

The opinion of the Court of Appeals is to be found in the Appendix attached to this petition. (C.A. 9, 16731.) This is a final judgment of the United States Court of Appeals for the Ninth Circuit wherein, after argument and submission of the appeal on December 16, 1960, a decision was rendered on July 16, 1963, for the defendants affirming the judgment of the United States District Court for the Northern District of California, Southern Division, directing the jury to render verdicts against the plaintiff and thereafter dismissing the action. This opinion is printed as Appendix "A". The opinion of the District Court is reported at 177 Fed. Supp. 743 (1959) and is printed as Appendix "B". The Judgment of the Court of Appeals is printed herein as Appendix "C".

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on July 16, 1963. The jurisdiction of this Court is invoked under c. 646, Act of June 25, 1948, 62 Stat. 928, 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals in affirming the District Court deprived petitioner of the right to trial

by jury by interpreting the evidence in a manner most favorable to the respondents and against the petitioner. In effect, the decision of the Court of Appeals nullifies the recent decision of this Court in *Continental Ore Co. v. Union Carbide Corp.*, 370 U.S. 690, although giving lip service to that decision.

2. Whether by pre-trial orders restricting introduction of testimony of events prior and subsequent to the precise period for which damages are claimed, the District Court, as affirmed by the Court of Appeals, can unduly limit the evidence considered relevant to a charge of antitrust conspiracy. Rather than exercising liberality in allowing plaintiff to present evidence to the jury to sustain the allegations of the complaint the courts below confined the testimony, with a few minor exceptions, to a period of a few months; then found insufficient evidence of conspiracy within the restricted period. By a further stringent application of the right to file an amended and supplemental complaint, the courts below prevented plaintiff's efforts to broaden the period of time despite the fact that defendants' discovery had extended to a much longer time interval.

3. Whether vertically integrated steel mills, having both steel manufacturing and steel fabricating departments and selling the same raw materials to the trade (such as the plaintiff) as used in their fabricating departments, can adopt a highly discriminatory system of allocation of steel during a period of shortage of steel. Such an allocation system resulted in huge quantities of steel being fabricated by defendants in

their own fabricating departments while the independent fabricators, such as plaintiff, were unable to get sufficient steel to complete the jobs for which they had contracts. Even where steel was allocated to the independent fabricators, deliveries were so slow that losses were encountered in completing the jobs.

4. Whether the allocation systems of defendants, where such defendants had virtual monopolies of certain steel products on the West Coast, constituted attempts by such defendants to monopolize the fabrication of these products.

5. Whether Section 10 of the Clayton Act, 15 U.S.C. Section 20, is to be made meaningless in a situation where a supplier has a virtual monopoly of a raw material needed to fabricate a product sold to a carrier by a steel mill having an interlocking director with the carrier. Thus in this case U. S. Steel, having a West Coast monopoly of Z-bars used in the fabrication of railroad car underframes, was able to prevent plaintiff and others from taking advantage of Section 10 of the Clayton Act requiring competitive bidding for furnishing supplies to the Southern Pacific Company, which had an interlocking director with U. S. Steel.

6. Whether the Bethlehem companies, separate corporations, could conspire among themselves to set up an allocation system on the Pacific Coast whereby the fabricating department of Bethlehem Pacific Coast Steel Corporation was favored as against the competing independent fabricators by administration of a

highly discriminatory allocation system for products produced by Bethlehem Steel Company, an affiliate.

STATUTES INVOLVED

Involved in this petition are the conventional anti-trust triple damage action statutes, Sections 1 and 2 of the Sherman Act, 15 USC Secs. 1 and 2 and Sec. 4 of the Clayton Act, 15 USC Sec. 15, and also a seldom applied statute, Sec. 10 of the Clayton Act, 15 USC Sec. 20.

All these sections are printed in Appendix "D" hereof.

STATEMENT OF THE CASE

Plaintiff, an Oakland, California, fabricator of structural steel and plate, purchased its steel from defendants herein. Each of the defendants was engaged in competition with the plaintiff in fabricating structural steel and plate. Thus this petition raises problems relating to vertical integration.

United States Steel Corp. is the only West Coast supplier of Z-bars necessary to the fabrication of about 45% of the steel required for railway car underframes. (R. 1528.) Due to weight and freight cost, competition with eastern suppliers is obviously and admittedly impractical. Similarly, Bethlehem had a real monopoly on wide flange structural steel and heavy plate because it could ship by water from its

eastern mills. The mills in the western part of the United States cannot roll wide flange material or Z-bars. Defendants are for practical purposes the only suppliers of plate in the western part of the United States. Hence we find a practical monopoly in the relevant market as follows: U. S. Steel was the only supplier of Z-bars; Bethlehem was the principal supplier of wide flange material used for big buildings and structures; Bethlehem was the only supplier of heavy plate; and the defendants were the principal suppliers of plate. (R. 1527-28.)

SOUTHERN PACIFIC CAR UNDERFRAME BIDS

We start this brief with a consideration of the Southern Pacific car underframe bids because we believe it easier this way to highlight the conduct of defendants and the significance of the vertical integration problems in this case. The case should be of particular interest to the Court because it presents dramatically the aftermath of *U. S. v. Columbia Steel Co.*, 334 U.S. 495 (1948). In that case, by a 5-4 decision, U. S. Steel was permitted to acquire Consolidated-Western Steel and its West Coast fabricating facilities, these facilities being the present Consolidated-Western Division of U. S. Steel Corp. The minority opinion in that case, written by Mr. Justice Douglas, pointed to the inherent danger of allowing the largest steel company in the World to acquire a dominant fabricator on the West Coast. The present case illustrates how that development of the

fabricating activities of the U. S. Steel Corp. restrained competition by destroying the ability of petitioner and others to compete.

Southern Pacific Company, from September, 1953, to June, 1957, engaged in a large car building program requiring the purchase of underframes for about 10,000 new box cars consuming about 70,000 tons of steel with a value of about 20 million dollars. Southern Pacific Company had an interlocking director with U. S. Steel in the person of Mr. James B. Black. (R. 2815.) Southern Pacific did not fabricate car underframes and so let this work for bid, pursuant to § 10 of the Clayton Act, 15 U.S.C. § 20, which applies in the case of interlocking directors of common carriers and forbids conduct which would prevent free and fair competition among bidders or those desiring to bid and forbidding anything directly or indirectly tending to prevent free and fair competition among the bidders or those desiring to bid. It is the contention of petitioner that the conduct of U. S. Steel constituted an attempt to monopolize the car underframe business in violation of § 2 of the Sherman Act as well as violating § 10 of the Clayton Act.

U. S. Steel, being the only practical supplier of Z-bars—45% of the total steel in the underframe—fixed an allocation system or "entry limits" as to the amount of Z-bars and other steel it would supply its customer-competitors who were to be the other bidders. The jobs called for 500 to 1,500 car underframes with about 1,400 tons for 500 car underframes and delivery was required in from five to six months.

The western fabricators invited to bid and the U. S. Steel allocations to them of Z-bars were as follows:

Bidder	Z-bar Allocation
California Steel Products	8 tons per month
Central California Blow Pipe Co.	no allocation
Gate City Steel Co.	146 tons for 3 months
Gunderson Bros. Engineering Co.	30 tons for 3 months
Independent Iron Works	10 tons per month
Yuba Manufacturing Co.	8 tons per month
American Pipe & Construction Co.	49 tons for 3 months
Consolidated Western Division of U.S. Steel	650 tons per month from Geneva, Utah, plus 375 tons from eastern mills and up to 15,000 tons per month from American Bridge Division of U.S. Steel—total, 16,000 tons per month

So on the allocation, a western competitor of Consolidated Western Division of U.S. Steel such as petitioner, could only get 50 to 60 tons for the 5-6 months period of the required minimum of 1,400 tons to bid on even 500 car frames. Independent Iron Works and some others bid anyhow, figuring they had a right to compete. Others, like Yuba or California Steel Products, merely answered the invitation to bid by saying they would like to bid but could not get the steel. (R. 2619-41; Ex. 443.)

In the four instances when anybody other than Consolidated Western Division of U. S. Steel was the low bidder, Southern Pacific threw out all the bids and either called for new bids or practically awarded the

business to Consolidated Western. (R. 2821-2833.) In two of the instances, the bids were awarded to Consolidated Western even though they were not the low bidder (Bids 145 and 151) and in another instance (Bid 148), Consolidated Western dropped its price and obtained the car underframes on the next bid where the earlier bid had been thrown out by Southern Pacific.

On Bid 153, closed September 12, 1955, covering 1,000 box car underframes, petitioner was the low bidder. (R. 2833.) Southern Pacific then rejected all bids. Thereupon, Southern Pacific put out new invitations to bid (No. 154) which closed October 7, 1955, for 1,500 box car underframes. On Bid 154, U. S. Steel was somewhat lower than petitioner, but Southern Pacific awarded 1,000 of the underframes to Consolidated Western Division of U. S. Steel and 500 to petitioner. U. S. Steel, however, insisted upon imposing upon petitioner its allocation system which resulted in delay in completion for twenty months, on a job which was required to be completed in five month . (R. 2420, 2868-78, 1805.) Also, the deliveries were so sporadic that the work could not be done by petitioner on an assembly line basis and the job had to be set up and taken down several times, causing the petitioner to lose $300,000.00 on this job. (R. 2314-24; 3537-44.)

The allocation system of U. S. Steel not only destroyed the ability of Independent Iron Works to compete, but also that of all the other western fabricators and accordingly Consolidated Western Di-

vision got the balance of the car underframe jobs to the tune of about seven million dollars on its own terms with no real competition.

The same pattern applied to the other essential material, plate, required for the car underframes. The allocations handed to competitors of Consolidated Western were inadequate to enable the Western fabricators to bid or to get the steel, and so they were eliminated from competition. (R. 2849, 2941-43.)

On the other hand, the allocations and prompt delivery to Consolidated Western Division of U. S. Steel were admittedly complete and adequate to enable them to handle every underframe job.

In the face of all the above evidence, the Court held that there could be no inference by the jury of wrongdoing by U. S. Steel Corporation, and that there must be a directed verdict against the plaintiff (petitioner herein); and that the jury were bound to accept the defense's (respondents herein) version of the evidence and that no other possible inference could be drawn. The Court allowed no inferences to be drawn from the effect of the allocation system or from the rejection of the low bids or from the effect of the whole setup in causing the steel all to go to Consolidated Western Division of U. S. Steel except for the small amount of delayed material allowed to Independent Iron Works, subject to the impossible allocation system.

This was all in the face of a statute forbidding anyone from directly or indirectly doing or attempting to do anything to prevent anyone from bidding or to

do any act to prevent free and fair competition among bidders or those desiring to bid, and in the face of another statute making actionable monopolization or an attempt to monopolize *any part* of trade or commerce.

In the Opinion of the Court of Appeals affirming the directed verdict for the appellees with regard to the cartrame issue, the Court ignored the wording of the statute and, in effect, concedes the point that the allocation system prevented those who were invited to bid and those who desired to bid, from bidding.

EVIDENCE OF CONSPIRACY TO RESTRAIN AND MONOPOLIZE

Among the factors from which the jury might have drawn an inference of conspiracy to restrain and monopolize by the defendant steel companies were the following:

1. The defendants all allocated steel to their customers on an historical basis, based upon purchases in some prior period of time. This was essentially a consciously parallel system of allocation. The system of allocation with some relaxation at times had extended from the end of World War II and the policy of each of the companies was well-known to the others. (R. 1367, 1524, 3512-14, 1649-51, 3419.)

a) U. S. Steel had an allocation system based on "entry limits" with the historical background of the customer as an important factor. (R. 2568.)

b) Bethlehem set up an allocation system which, in 1955, was based on "quotas" compared to the amount purchased in 1954. (R. 3095, Ex. 58.)

c) Kaiser was on an allocation system in 1955 with an essential element of purchases in a past base period in 1954 for the "*amount to be sold*" or the "offering."

The whole system was essentially the same whether the terms used were, "entry limits"—"quotas"—"amounts to be sold" or "offerings." As Mr. Aurelius, the national sales manager of U. S. Steel admitted, the system was based on backing a "good horse" with an arbitrary determination of the amount of steel to be sold to a fabricator who is both a competitor and a customer, with admitted opportunity to handicap the horses by putting lead in the saddle bags. (R. 2560, 3055.) This put the fabricators-competitors in competition with their manufacturer-fabricator-suppliers and left petitioner as a "competitor at sufferance" and in a position of complete dependence in this instance as a mere sitting duck for destruction by the predators.

2. The vertical integration of the defendants, putting them in the steel fabricating business as competitors of Independent Iron Works as well as suppliers, created a ripe situation for discrimination. Such power should not be allowed to exist under such circumstances even though vertical integration per se might not be illegal.

3. A comparison, as stated above with reference to the car underframes and other evidence in the

record as to the allocations and shipments of defendants to the plaintiff as compared to the shipments to their own fabricating facilities reveals the highly oppressive nature of the allocations.

We earlier gave the figures as to Z-Bar allocations for the car underframes. The situation was about the same as to the defendants-suppliers and fabricating-competitors with reference to other types of steel and there similarly were "entry limits," "quotas" and "offerings" by the defendants as to wide flange structural steel (used for large buildings and bridges) and plate. There is much of such testimony in the record, but the following are a few instances:

Independent Iron Works had the plant capacity to compete on large jobs with U. S. Steel and Bethlehem using wide flange material. However, U. S. Steel's allocation for wide flange to its own fabricating facilities ran in excess of 25,000 tons per month as compared with 30-77 tons for petitioner. (R. 2535.) (A large job such as the Richmond-San Rafael Bay Bridge would require about 50,000 tons of steel.)

Bethlehem was the principal supplier of wide flange on the West Coast and by reason of the ocean freight rate had a substantial monopoly, as earlier pointed out. The evidence showed that:

a) When the supply was the tightest, Bethlehem took the most. Thus in the third quarter of 1955, Bethlehem shipped to its own West Coast fabricating shops more than it shipped to all of the fabricators in the area combined. (Ex. B-70.) As to Independent

Iron Works, Bethlehem shipments declined from 4,426 tons in 1954 to 1,823 tons in 1955. (Ex. U-2.)

b) Bethlehem consistently discriminated in favor of its own fabricating activities and made prompt delivery to such vertically integrated fabricating shops as compared with the independent fabricators. (R. 2685, 3256-57, 2087-2101, 3264.)

c) Bethlehem boldly took advantage of this discrimination and had the effrontery to advertise to the trade that if they dealt with Bethlehem they would be able to get "steel fabricated and erected *on time*," and "on schedule." (Ex. 446.)

With respect to Kaiser, as soon as Kaiser went into the fabricating business in 1955 it quadrupled the allocation for its fabricating plant at Montebello, California (R. 1581), and whereas the shipments to Independent Iron Works in 1954 were 3,720 tons, shipments in 1955 dropped to 1,072 tons. From this we believe a jury could infer that Kaiser joined the allocation conspiracy in which U. S. Steel and Bethlehem had already been engaged.

4. Price uniformity: At page 13 of its opinion the Court of Appeals quoted Mr. E. T. Weir, Chairman of the Board of National Steel Corp., that U. S. Steel generally took the lead in making prices of steel. Except for limited products, there was price uniformity.

5. Trading off of steel: As stated at page 14 of the Court of Appeals' Opinion, Bethlehem's Vice President, Mr. Honeycutt, put it, "We buy from them (i.e., U. S. Steel) and they buy from us," but the lower

Court omitted to state that he hastened to add that it was in *similar amounts*. (R. 1646-48.) In this period of alleged short supply, American Bridge Division of U. S. Steel got 4,500 tons per month of wide flange from Bethlehem and Bethlehem got a similar amount from U. S. Steel. (R. 2704.) Petitioner contends this amount is a "trade," even though payment was made in money rather than by barter. At the same period of time, the allocation of U. S. Steel to plaintiff was 30-77 tons and Bethlehem's allocation to petitioner was 200 tons per month. Kaiser, the new member of the "captive fabricating club", got preferential treatment in shipments from Bethlehem of 3,265 tons of wide flange in eleven months of 1955 as compared with 2,265 tons of steel in 1954 to its predecessor, Union Steel, whose fabricating facilities Kaiser bought early in 1955. (Ex. 457 C; R. 3193.)

The jury could reasonably draw the inference of conspiracy because competitors ordinarily do not sell to each other or trade off steel to each other, but rather acquire their own customers and sell to them. In periods of tight supply, it would seem that true competitors would be supplying their own customers rather than competitors.

6. Non-competition of the defendants in certain areas: The defendants have allocated certain lines to themselves and seem to be rather careful not to step on each other's toes. Thus, U. S. Steel has warehouse facilities, but Bethlehem and Kaiser do not. Bethlehem has shipbuilding facilities, but U. S. Steel and Kaiser do not. Most bridges in the West Coast area

go to U. S. Steel and most large multi-story office buildings to Bethlehem. Pipelines are divided between U. S. Steel and Kaiser. (R. 2705, 295.)

REASONS FOR GRANTING THE WRIT

For the purpose of clarity, a short statement of reasons for granting the writ is here set forth. These are expanded in the argument following this résumé.

1. The decision of the Court of Appeals is in conflict with the decision of this Court in *U. S. v. W. T. Grant Co.*, 345 U.S. 629; *U. S. v. DuPont*, 353 U.S. 586; and *U. S. v. Philadelphia National Bank*, ___ U.S. ___, 10 L.ed. 2d 915, as to the significance of §§ 7, 10 and 15 of the Clayton Act.

2. The Court of Appeals concedes that the ruling of the trial Court was in conflict with the decision of this Court in *Cement Manufacturers Association v. U. S.*, 268 U.S. 588, as to the admissibility of testimony of distinguished economists, but erroneously held this was not prejudicial.

3. This decision is in conflict with the decisions of this Court in *Tennant v. Peoria & Pekin Union R. Co.*, 321 U.S. 29; *Lavender v. Kurn*, 327 U.S. 645; *American Tobacco Co. v. U. S.*, 328 U.S. 781, and *Kiker's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, in the Court's assumption of the jury's prerogative in directing this verdict.

4. This decision is in conflict with the decisions of this Court in *U. S. v. Patten*, 226 U.S. 525, and

particularly the recent decision of *Continental Ore Co. v. Union Carbide Co.*, 370 U.S. 690, in refusing to look at the conspiracy as a whole but so ruling as to dismember it and wipe the slate clean after scrutiny of each dismembered part. Although the Court below gave lip service to the rule of *Continental Ore*, a reading of the Opinion shows that precisely what the Court did was to consider each separate component of a complex case and never consider the whole picture and thereby deprived plaintiff of its Constitutional right of trial by jury.

ARGUMENT

I. AS TO THE CAR UNDERFRAMES AND §10 OF THE CLAYTON ACT.

The lower Court completely ignores the plain requirements of §10 of the Clayton Act and simply substitutes its own views of the evidence and that of Southern Pacific in defense of their position, for the view that the jury could take. The jury could very well conclude and infer that the rejection of the lowest bids and the imposition of the allocation system was really not the most favorable arrangement for the railroad and that it, in fact, prevented free and fair competition and prevented those who were invited to bid and who desired to bid, from competing. In the long run this would make the carframes cost more, and thus, to an extent increase rates. If the jury had been allowed to consider the evidence offered as to intent, motive, plan and design, they could also

have found that this allocation system and the rejecting of the bids of competitors was intended to and did, in fact, result in eliminating competition and creating a monopoly for U. S. Steel Corporation in the car underframe business.

In the light of the trial Court's ruling (R. 2359) with regard to the offer of proof to try to show the whole transaction as bearing upon the issue of destruction of competition (R. 2311-2324) and also on intent, motive and plan or design (R. 3532-3534), petitioner submits that the Court was clearly in error in making this ruling and denying the evidence of subsequent acts. The offer of proof covered what we have summarized under this heading and the offer of proof as to intent, motive, plan or design is at R. 3532-3534. Under well recognized principles of law, plaintiff should have been allowed to show the entire transaction and how it resulted in eliminating competition and how it resulted in giving the conspirators, Southern Pacific Company and the Consolidated-Western Division of U. S. Steel, the object they desired to obtain from the conspiracy.

Clayton Act provisions relating to carframes.

At the outset of this brief, we have cited the applicable provisions of Sec. 10 of the Clayton Act. From an analysis of these provisions, it is clear that the punishment or private suit for treble damages for violation of this Act is committed entirely to the Courts, and the evidence is to be judged by the triers of the facts.

The lower Court completely ignores the significance of Sec. 10 with reference to interlocking directors.

Thus, so far as the third cause of action is concerned relating to the carframes, the applicable decision holding that § 15 gives a remedy by way of private antitrust action is *U. S. v. W. T. Grant Co., et al.*, 345 U.S. 629, 97 L.ed. 1303, 73 S. Ct. 894 (1953). This case holds that the Clayton Act provides for a dual system of enforcement under which Congress has explicitly provided for concurrent jurisdiction in the Interstate Commerce Commission and the Courts. In this connection, Mr. Justice Douglas points out with regard to the interlocking directorship arrangements, that the practice substitutes "the pull of privilege for the push of manhood." He states as follows:

> "Moreover, those entwined relations are the stuff out of which concentration of financial power over American industry was built and is maintained. The web that is woven may tie many industries, insurance companies and financial houses together into a vast and friendly alliance that takes the edge off competition."

In *U. S. v. DuPont*, 353 U.S. 586, 77 S. Ct. 872, 1 L. ed. 2d 1057, Mr. Justice Brennan discussed § 7 of the Clayton Act relating to stock purchases and whether the Act could be construed to apply to vertical acquisitions. The previous cases had involved only competitors, and at page 1065 of the L. ed. of this decision, the Court said:

> "The Federal Trade Commission has said that the section did not apply to vertical acquisitions."

In regard to what recognition should be accorded to the holdings of this administrative body, the Court said:

> "This Court has the duty to reconcile administrative interpretations with the broad antitrust policies laid down by Congress. . . . The failure of the Commission to act is not a binding administrative interpretation that Congress did not intend vertical acquisitions to come within the purview of the Act. Accord *Baltimore & Ohio Railroad Co. v. Jackson*, 353 U.S. 325, 1 L. ed. (2d) 862, 77 S. Ct. 842."

The opposition would have us believe that the interlocking directorate between Southern Pacific Company and United States Steel Corporation had nothing to do with this discrimination and that the reasons stated by Southern Pacific Company must be accepted. (R. 2900-2901.) Theodore Roosevelt and Woodrow Wilson fought the battles against the inherent evils of interlocking directorates fifty years ago; that appellant would be forced to refight the same battles in this case is to flaunt Congressional intent. We submit that the jury could have drawn an inference from this conduct; that the conduct of the Southern Pacific Company and United States Steel Corporation was to eliminate competition which might well have the effect of raising the price to the railroad and consequently raising the rates to the public.

If we added to the throwing-out of the bids a consideration of the fact that United States Steel Corporation, through its Geneva mill, had a monopoly on

the supply of Z-bars in the Western states which gave it, for all practical purposes and all competitive purposes, a complete monopoly, we then have a situation where the jury could have considered that the monopoly power of the United States Steel Corporation was preventing free and fair competition among bidders or those desiring to bid. It is a jury question whether this monopoly power was being employed to eliminate competition or, so far as the statute is concerned, to prevent free and fair competition among bidders or those desiring to bid.

When, in addition to the foregoing facts, we consider that the United States Steel Corporation through its Geneva mill gave prompt delivery to its own Consolidated-Western Division but delayed delivery to appellant on the Z-bars, so that United States Steel's carframe deliveries were always satisfactory (R. 2837, 2839, 2883), the jury might well have concluded that the delaying of delivery to Independent Iron Works by the monopoly showed an intent to prevent free and fair competition among the bidders or those desiring to bid.

In addition to the foregoing considerations and bearing on direct or indirect prevention of free and fair competition among bidders or those desiring to bid, the jury might well have considered the "entry limits" which were fixed by United States Steel for its own Division and for Independent Iron Works and the others who had indicated a desire to bid. These "entry limits" didn't allow Independent Iron Works or Yuba Manufacturing Company or California Steel

Products enough steel to permit them to compete even though they were invited to compete and expressed a desire to compete. (Exhibit "424".) The evidence shows that some of these companies had smaller "entry limits" than appellant, such as 8 tons per month. The evidence further shows these bidders had fabricating plants and facilities which would have made it possible for them to compete.

Only the American Car & Foundry Company, the Pullman Company, and Consolidated Western had "entry limits" large enough to allow them to compete and in three instances when the American Car & Foundry Company were low bidder they were not given the award. In each instance, United States Steel Corporation had adequate "entry limits" for its "good horse," Consolidated Western Steel Division, and the saddle bags were loaded (R. 3005) on the other horses by limited allocations so that they could not compete or run in the race.

From the consideration of all the above factors and elements, it seems clear that there was both direct and indirect and irrefutable evidence that United States Steel Corporation and Southern Pacific Company together, and the United States Steel Corporation alone, did everything possible directly and indirectly to prevent free and fair competition among the bidders or those desiring to bid.

2. MONOPOLY AND THE ATTEMPTS TO MONOPOLIZE

The respondents have a practical monopoly in furnishing structural steel and plate on the West Coast. There are a few small West Coast mills and some of the Eastern and Middle Western mills sell certain products there, but at least 75% of the plain material required by the appellant is sold by the appellees. Wide flange material (a particular type of structural steel similar to an I-beam) is sold only by U. S. Steel and Bethlehem in a full line. (R. 1527.) Heavy Z-bars are sold only by U. S. Steel. (R. 1528.) Plate and heavy structural shapes are sold by appellees U. S. Steel, Bethlehem and Kaiser, and by practically no one else. (R. 1930.)

In times of abundance of steel, the fabricating divisions of the steel companies cut prices for fabrication, and thus insure that outside mills do not get a foothold in the market. (R. 2413-14, 2958, 3148.) In times of steel shortage when the other steel mills are not interested in selling on the West Coast because they can sell closer to their plants, the respondents employ an allocation system which keeps the independent fabricators from growing and expanding during the very period of time when business is good, and when they would normally expand.

Thus defendants use their position as the chief suppliers of steel to monopolize the fabrication business, and correspondingly use their position as the chief fabricators in the area to monopolize the sale of plain material.

The use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage or destroy a competitor, is unlawful. Monopoly power cannot be used to beget monopoly. *U. S. v. Griffith*, 334 U.S. 100.

Petitioner would refer the Court to the section of the Report of the Attorney General's Committee, pages 43 to 62, on Section 2 of the Sherman Act, and specifically to Monopoly and Attempts and Conspiracies to Monopolize.

In addition to charging a conspiracy to restrain trade and to monopolize the steel distribution industry and the steel fabricating industry, the complaint also charged the defendants had individually attempted to monopolize these industries.

An attempt to monopolize is a separate offense quite apart from a conspiracy (15 U.S.C.A. 2); and an attempt to monopolize may be joint (in which case it is, for practical purposes, identical with a conspiracy) or several. Consider, for example, the freightcar underframe business in which United States Steel Corporation is engaged, and in which none of the other defendants was engaged up to the filing of the complaint herein. Consider also that United States Steel Corporation is the sole manufacturer of Z-bars in the West. Thus, leaving all other aspects of the case to one side for the moment, it can be seen that the jury might have found an attempt to monopolize by United States Steel Corporation that part of trade and commerce involving the fabrication of railway car underframes. This issue was not submitted to the jury.

In this brief the cartframe issue is considered in connection with the § 10 violation because the facts are so intimately connected with that subject matter, but we raise this as one good example of an attempt to monopolize which should have been presented to the jury.

Similarly, Bethlehem is the principal supplier of wide flange beams and columns on the West Coast by reason of the fact that its mills for the rolling of such plain materials are located on the Eastern Seaboard where a favorable ocean freight rate is applicable. Wide flange beams and columns are essential to the fabrication of multistory buildings and the evidence shows that Bethlehem got most of the awards for such buildings. Indeed, Crown Zellerbach Corporation, when it built its new office building in San Francisco as well as several warehouse buildings elsewhere, did not even consider other fabricators but gave the contracts for steel fabrication and erection direct to Bethlehem without competitive bidding. (R. 2952-55.) Here, again, the jury should have been permitted to determine whether Bethlehem had attempted to monopolize this portion of trade and commerce by means of its allocation of wide flange beams and columns, as well as other activities which were the subject of testimony.

The respondents have a practical monopoly in furnishing structural steel and plate on the West Coast. Wide flange material is sold only by United States Steel Corporation and Bethlehem in full lines. (R. 1527.) Plate and heavy structural shapes are sold by

the three respondents and practically no one else. (R. 1930.) Mr. Meagher testified that in times of abundance of steel, the fabricating divisions of the steel companies cut prices for fabrication and thus insured that outside mills did not get a foothold in the market (R. 2413) and that the appellees "kited" bids as a regular practice. (R. 2415, 2958, 3439 et seq.)

The Gohl deposition states that Bethlehem bid to cover material and labor, without mentioning overhead or profit (R. 3323) but if that operation were carried on right along on a non-profit basis, independent fabricators could be driven out of business shortly, whereas the mills could stay in business on the profit from the sale of the plain material.

The allocation system keeps the independent fabricators from growing and expanding during the very period when business is good and when they would normally expand. When business is bad they can't compete with the monopoly suppliers because they can't get the business. (R. 2413, 2484.) Unless the allocations are disregarded in bidding jobs, no substantial business can be acquired in good times. (R. 2419.) Thus, the evidence supports the primary contention of the first and second causes of action that there is a monopoly or attempt to monopolize by respondents on the West Coast.

3. ERROR IN EXCLUSION OF TESTIMONY OF ECONOMISTS.

Prior to the trial, plaintiff took the deposition of Dr. Theodore John Kreps, Professor of Business Economics in the Graduate School of Business at Stanford University. This deposition is reproduced in the record in full, commencing at page 3550. Dr. Kreps has had a long and full career in the field of anti-trust economics, commencing with the work done for his thesis at Harvard in 1928. He served as Economic Consultant to the Department of Justice, as Economic Advisor on the Temporary National Economic Committee and with the House Antitrust and Monopoly Subcommittee; he was Economic Consultant and Head of the Chemical Section of the C.P.A., Chief Economic Advisor on the Board of Economic Warfare. He is a Life Fellow of the Royal Economic Society, a member of the American Economic Association and of the American Academy of Political and Social Science. He is the author of the article on Industrial Organization in the Encyclopaedia Britannica, as well as of numerous other articles.

At his deposition (R. 3547) he was asked for an economist's explanation of the science of economics relating to the elements of competition and, in the course of his testimony referred to the economic standards of the Attorney General's Committee on the study of the antitrust laws and criteria of competition set forth therein at page 324 of the Report of that Committee. He stated that his own opinion agreed with the report of the Committee and then restated his own standards of competition.

Thereafter, a series of hypothetical questions were posed to Dr. Kreps based upon the facts theretofore adduced in the depositions taken by the plaintiff and similar in scope and phrasing to the hypothetical questions commonly asked of expert witnesses in any other fields of litigation. Thus at bottom of page 3571 the witness testified in response to a question as to whether an allocation system would be consistent with competition where those responsible for setting up the system stated that its purpose was to achieve continuity of operation in good times and bad times, as follows:

> "You see, by keeping prices down in a period of shortage, you thereby tend to encourage an excessive demand, more demand at that price than can be supplied. That means that the new people that would like to come into the market to supply that demand, won't be able to get in. Then you come around to the period of surplus, and, instead of getting new people in with lower prices or the other inducements—now, you understand I am always thinking of prices as (27) primary inducements; then other inducements, also—you have a part of the market taken by one group and then you leave these people that couldn't get in at the top, or those that get in only partly at top, now you leave to them a mere fragment at the bottom of the market. In that case it might well be that here is a particular plant of a group of plants that have a very stable market with these others not so fortunate unable to get in at the time when prices are high, and suffering getting the remnants or crumbs of the market at times when prices are low, the net result being that you have

instability for the industry as a whole, because price, the law of supply and demand, wasn't allowed to function."

Dr. Kreps stated that price is the allocator in competition and that allocation is not consistent with free competitive enterprise in an industry. The buyer does not have a chance to induce a seller to sell him by offering him a better price or some other inducement. The system of allocation described herein is not consistent with competition. Monopoly or market power in the hands of one producer would not allow effective or workable competition. With the allocation and monopoly set up, of this case there is merely competition at sufferance in the position of dependents. The competitors, in periods of short supply would not sell to each other in preference to selling to regular customers at the same price in a competitive, economic society. They would be independent of rivals. The Court is respectfully referred to the testimony of Dr. Kreps which comprises some 64 pages of the printed record and throws considerable light on the facts of this case as viewed by modern economists as voiced by a distinguished expert in this field.

Following the direct examination of Dr. Kreps, defendants moved for an order

"excluding as evidence for any purpose in the within action the testimony or oral deposition of Dr. Theodore John Kreps, taken by the plaintiff herein on June 21, 1936, on the ground that such testimony is irrelevant and inadmissible evidence in the pending action and is not reasonably cal-

culated to lead to the discovery of admissible evidence". (R. 225.)

On September 28, 1956, Judge Edward P. Murphy entered an order reading as follows (R. 287):

> "The defendants are charged with a violation of the antitrust laws; not with a violation of scientific principles affecting the conditions and laws of production, distribution and consumption of wealth, of the material means of satisfying human desires.
>
> The case, therefore, will be tried upon legal principles, not economic ones. Should it become apparent upon the trial that the testimony of an economist would be of assistance to the court and jury, the court will in the exercise of its discretion call an expert of its own or one chosen by mutual consent of counsel. I hold with Judge Yankwich (Short Cuts in Long Cases, 13 F.R.D. 41) that economic theories are out of place in the average antitrust case. The deposition of Dr. Theodore J. Kreps is stricken from the record."

Thus the Court not only struck the deposition but ruled that testimony of Dr. Kreps could not be used at the trial. This was error and the Court of Appeals so conceded.

That the opinion evidence of an economist on the issues for which this testimony was offered was properly admissible is clear.

Cement Manufacturers Assn. v. U. S., 268 U.S. 588 (1925);

United States v. U. S. Steel Corp., 251 U.S. 417;

Wharton's Criminal Evidence (12 Ed.), Sec. 502).

Indeed it is conceded by the Court below that the District Court erroneously excluded this testimony.

The Court excuses the erroneous ruling on the ground that despite the explicit and unequivocal ruling at the pre-trial, plaintiff did not press the introduction of the testimony at trial. Where the Court in a preliminary ruling excludes an entire class of evidence it is needless to make specific offers of evidence.

Wigmore on Evidence (3d Edition) Sec. 17, p. 318;

88 *CJS* 180, Trial, Sec. 74;

Alford v. U. S., 282 U.S. 687, 694;

Witkin, *Calif. Evidence*, Sec. 715; p. 745;

Lawless v. Calaway, 24 C. 2d 81 at 91, 147 P. 2d 604;

Caminetti v. Pacific Mutual Co., 23 C. 2d 94 at 100, 142 P. 2d 741.

Accordingly, it was error for the District Court to refuse plaintiff the opportunity to use the facilities of an economic expert in this case and to testify as an expert as to the lack of competition, restraint and monopoly apparent from the facts in the case such as the allocation system of the defendants, lack of price competition, trading off of steel between the companies, etc. This is particularly significant when the Court ruled that the plaintiff "must rely upon reasonable and logical inferences from the evidence in the record". How better to show such inferences than from the testimony of experts in this field?

4. SUBSTANTIVE LAW ON LEGALITY OF ALLOCATION SYSTEM.

Although it is sometimes stated that a person acting independently has a right to refuse to deal with another, this alleged right is severely restricted by the Antitrust Laws. An allocation system is a partial refusal to deal with another. The American Law Institute Restatement of Torts, Sections 764 and 765; 4. Restatement Torts, pages 41-43 sets forth these limitations. The boldface portions of the two sections of the Restatement are set forth herein:

> "§ **Refusal for Purpose of Monopoly.**
>
> One who in his business refuses to deal with another in order to establish or maintain an illegal monopoly is liable to the other for the harm caused thereby." (Page 41.)
>
> * * * * * * *
>
> "§ **Concerted Refusal to Deal.**
>
> (1) Persons who cause harm to another by a concerted refusal in their business to enter into or to continue business relations with him are liable for similar conduct without concert, if their concerted refusal is not justified under the circumstances.
>
> (2) In the issue of justification under the rule stated in Subsection (1), the following are important factors:
>
> (a) The objects sought to be accomplished and the interests sought to be advanced by the actors' conduct;
>
> (b) The extent of the hardship caused to the persons against whom the actors' conduct is directed and his opportunities for mitigating the hardship;

(c) The appropriateness of the actors' conduct as a means of advancing their interests and the availability of less harmful means to that end;

(d) The relations between the actors and the person against whom the conduct is directed and their relative economic power;

(e) The effects of the actors' conduct and of its objects on the social interest in business enterprises and competition."

(Pages 42-43.)

Even though the alleged purpose of the refusal to sell may have an aura of beneficence, a concerted refusal to sell is illegal. One example is the attempt by the garment industry to stop immoral, but not illegal, piracy of women's dress and fabric styles by a trade association of better class dress manufacturers which boycotted retail outlets selling cheap pirated copies. The attempt was held illegal.

Fashion Originators' Guild v. Federal T. Co., 312 U.S. 475 (1941).

Another example is a World War I situation whereby public-spirited citizens of New Mexico boycotted the Hearst newspapers and magazines on the ground that Hearst was allegedly pro-German and against the war. This boycott was sponsored by official agencies of the State of New Mexico, the governor and the Attorney General. Nevertheless, a preliminary injunction under the Sherman Act was sustained.

Council of Defense v. International Magazine Co., 267 Fed. 390 (C.C.A. 8, 1920).

Boycotts even for such beneficent purposes as forcing dealers to enter a trade association have been stricken.

W. W. Montague & Co. v. Lowry, 193 U.S. 38 (1904);

Binderup v. Pathe Exchange, 263 U.S. 291 (1923).

A boycott of a dealer who sold both wholesale and retail was condemned in *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30 (1930).

Thus, no matter how laudable the purpose of boycott or refusal to sell may seem to those who participate in it, any concerted refusal to sell has been held illegal.

The report of the Attorney General's National Committee to Study the Antitrust Laws, commencing at page 132 takes up the matter of refusals to deal. It is pointed out that a refusal to deal resulting from a combination or conspiracy is a boycott and is obviously illegal. However, even in the absence of a conspiracy, a refusal to deal for monopolistic ends is illegal. The lower Courts refused to submit these issues to the jury.

An allocation system is merely a limited refusal to deal. If used by a producer having monopoly power as a device to maintain or expand effective market control, it is illegal.

Banana Distributors v. United Fruit Company, 162 Fed. Supp. 32.

Freezing competitors on a historical basis where prejudice to the public interest results is an undue and unreasonable restraint of trade. *Rogers v. Douglas Tobacco Board of Trade*, 244 F. 2d 471.

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5. CONSPIRACY AMONG THE BETHLEHEM COMPANIES.

During the period of time covered by the complaint there were two Bethlehem operating corporations, both defendants in this case, one in the East and one on the West Coast. The Eastern company was Bethlehem Steel Company and the Western company was Bethlehem Pacific Coast Corporation, both of which were subsidiaries of Bethlehem Steel Corporation, a holding company. During the early stages of the case, counsel for the Bethlehem Companies went to great extremes to preserve a line of distinction between the two defendant Bethlehem companies, claiming that Bethlehem Steel Corporation was not subject to the jurisdiction of the Court, and that Bethlehem Pacific Coast Steel Corporation was not the agent or alter-ego of the Eastern producer. (R. 623, 348-50, 368, 354.) On the eve of the trial the two defendants merged and thereafter this line of distinction was ignored by counsel. (R. 3046-47.) However, there is no question but what the two companies were separately incorporated, had separate officers (with only some overlap of minor officials) (R. 0, 0, 552) and preserved all of the trappings of separate entities. Under these circumstances, the decisions are clear that a conspiracy in violation of the antitrust laws may be found to exist.

Thus, even though the Court did not find United States Steel and Kaiser were participants in the conspiracy, there might well have been a finding by the jury of a conspiracy between the two Bethlehem companies. The direction of the verdict prevented submission of this issue to the jury.

The evidence shows that the Eastern company, namely, Bethlehem Steel Company produced certain products, such as wide flange beams and heavy plate which were not produced on the West Coast. (R. 339-42, 344.) Plaintiff and other West Coast fabricators submitted their orders for such materials to the Pacific Coast company, who then purchased the material from the Eastern company. (R. 555.) Bethlehem was the principal source of wide flange beams and columns on the West Coast and hence was an extremely important source of supply for plaintiff as well as the other fabricators. There is no question but what there were oral and written communications between the two Bethlehem companies, whereby the allocation system imposed upon the West Coast independent fabricators was worked out by conspiratorial, cooperative action. The testimony of the witness Cort (R. 3016-3252) is replete with references to conversations which he had with officials of the Eastern company, namely, principally Wilmot, and the record abounds with exhibits showing conspiratorial conduct between Eastern officials of Bethlehem Steel Company and West Coast officials of Bethlehem Pacific Coast. The deposition of Wilmot, which was read to the jury likewise brings out these factors. (R. 2981.)

As a matter of law the conspiracy under these circumstances is a violation of the antitrust laws, and the issue of whether there was a conspiracy between the Bethlehem companies should have been submitted to the jury. The following cases show that conspiracy between two subsidiaries of the same parent corporation, or between a parent and its subsidiary, constitutes a violation of the antitrust laws:

Kiefer-Stewart v. Seagram, 340 U.S. 211;
Schine Chain v. U. S., 334 U.S. 110;
Sanib Corp. v. United Fruit Co., 135 F. Supp. 764.

The lower Courts in this case completely disregarded this Court's rulings in the first two of the above cases.

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6. **ADMISSIBILITY OF EVIDENCE PRIOR TO JANUARY 1, 1955, TO SHOW ORIGIN AND BACKGROUND OF CONSPIRACY.**

On December 31, 1954, plaintiff made a settlement and executed a release with defendants U. S. Steel and Bethlehem relating to several causes of action existing prior to that time. The release is printed in the answer of Kaiser (R. 182) and the consideration was of a value of about $350,000. Plaintiff does not contend that the release or the amount of the settlement should have been presented to the jury. However, it is plaintiff's contention on this appeal that on the pretext of the release severe limitations were imposed upon the admission of evidence of facts occurring prior to January 1, 1955. This, coupled with the fact that the Court made a corresponding order limit-

ing evidence subsequent to the filing of the original complaint. November 28, 1955, confined plaintiff's proof to an eleven-month period (with the exception of a few jobs mentioned in appendix B to the pre-trial order of June 19, 1959).

During the pre-trial proceedings, when it became evident that the District Judge was contemplating the entry of an order limiting proof prior to January 1, 1955, plaintiff submitted a memorandum entitled "Plaintiff's designation of 1950-1954 Jobs on Which Evidence Will Be Introduced" (R. 729) and accordingly urged upon the Court, the admissibility of such evidence showing that the allocation system which was imposed in 1955 was no temporary expedient of the individual defendants, but was a part of a substantially continuous course of conduct of the defendants, extending back at least to World War II. This was an offer of proof, rejected almost in its entirety. Among the items of evidence which the Court thus excluded were the depositions of Houston (R. 3786), Halcomb (R. 3804) and Small (R. 3822) taken in Washington, D.C. in March 1957. These witnesses had been connected with the Civilian Production Administration, or its predecessor The War Production Board. Their testimony related to a meeting of the Industry Advisory Committee, of which the defendants were members, held in Washington toward the end of World War II, and specifically to minutes of a meeting of such Board, in which it was stated that the steel industry had adopted a voluntary allocation system based upon purchases of customers at a prior

period of time, with certain modification to take care of the needs of returning World War II veterans. The minutes in question were certified copies obtained from the Archives of the United States as official records of the Civilian Production Administration. (Ex. 2 of deposition of Halcomb, R. 3804; Ex. 1 to deposition of Small, R. 3832.) The exclusion of this testimony (Pre-Trial Order, R. 769, par. 8) was not on the basis that the minutes of the meeting in question were not satisfactorily proven (Rule 44, FRCP), but rather purely on the matter of remoteness of time. It is plaintiff's contention on this appeal that although the jury did not necessarily have to agree with plaintiff's position that the conspiracy started at the meeting of the Industry Advisory Committee, nevertheless the possible origin of the conspiracy should have been submitted to the jury.

With respect to the minutes of the Industry Advisory Committee which were excluded by the Court's pre-trial order, such minutes were taken pursuant to War Production Board General Administrative Order No. 2-141, effective January 14, 1944, which rules were adopted by the Civilian Production Administration as set forth in 10 Federal Register 13714, November 5, 1945. The rules applicable to meetings with groups of industry representatives provide:

RULES APPLICABLE TO MEETINGS WITH GROUPS OF INDUSTRY REPRESENTATIVES

Section 4. *Procedure for Establishing and Using Industry Advisory Committees:*

03. *Meetings of Industry Advisory Committees:*

6 *Presiding Officer, Agenda and Minutes.* The government presiding officer shall preside over all meetings of a committee. He shall cover each topic on the agenda of the meeting before considering such other problems as may come before the meeting and shall be responsible for the keeping of minutes of each such meeting. Minutes may be a summary of important matters discussed at the meeting and need not be a full stenographic record. The Director of the Office of Industry Advisory Committees shall decide whether minutes should be distributed, and if so, to whom they should be distributed.

The official nature of the minutes is established by the foregoing rules. The fact that these minutes were certified from the Archives of the United States gives further force to their official nature.

The minutes which were excluded contain statements of industry representatives at a meeting of the Steel Advisory Committee, establishing that the in-

Steel Advisory Committee, establishing that the industry had adopted a voluntary allocation program whereby steel was allocated to customers on the basis of their historical record of purchases. Such allocation program had no official sanction, but the minutes establish that it was originated and in existence at the time of the meeting in question. Plaintiff contends that this program was adopted immediately after the war by the industry as a whole and continued in effect during each shortage period up to the date of trial.

In the pre-trial order of June 19, 1959, the trial Court ruled out the strongest admissible evidence to prove the existence of the conspiracy. (R. 726.) Some of this evidence was quite dramatic.

Judson-Pacific Murphy Corp. Testimony

This fabricator's testimony relates primarily to the Richmond-San Rafael Bridge and is contained in the deposition of Murphy. A joint venture of Murphy and others was formed to bid on the Bridge, and entered a bid for $21,000,000 which was $7,000,000 low, and won the award. United States Steel bid $28,000,000 and Bethlehem $30,000,000. The bids were made in 1952. Originally, the Bridge included 42,000 tons of which about 15,000 tons was wide flange. As a result of negotiations with Bethlehem and U. S. Steel, each of those two companies fabricated approximately 10,000 tons. The remainder of the tonnage required for fabrication by Murphy was obtained from Bethlehem and U. S. Steel with about 2,500 tons obtained

from Kaiser, Murphy made a profit of $3,000,000 on the job, with the possibility of additional profit depending upon income tax considerations. Fabrication commenced in 1953 and the Bridge was completed in 1955.

Independent Iron Works had an oral contract with Murphy to award to Independent Iron Works 10,000 tons of fabrication. When Murphy experienced difficulty in obtaining steel and it was necessary to award 10,000 tons to U. S. Steel and 10,000 tons to Bethlehem, there was nothing left over for Independent Iron Works, and hence the contract was breached.

This bridge incident shows how U. S. Steel and Bethlehem conspired to cut a melon of at least $7,000,000 in profit on this one bridge at public expense by the use of their monopoly control over wide flange supply. It is as good an example as could be presented of the operation of monopoly in milking the public and inflating prices. This evidence was pertinent to show public damage, if nothing else. It was also relevant to show how the consumption of defendants' fabricating departments was increased in the base year of 1954, which was then used as a base year in allocating steel during the 1955 shortage.

Union Steel Company Testimony

The testimony on this fabrication is found in the depositions of Dalebout and Mathwig. Note the Exhibits in the Mathwig deposition which detail ten jobs, one of which was:

Marston Store. Union Steel was low bidder in 1953 on a contract where the contractor required that the steel be in Union's yard by January, 1954, in order to complete erection by April 1. Union attempted to get commitments from Bethlehem and U. S. Steel to deliver the steel in time, but despite the fact that both those Companies had guaranteed to the customer to complete the job in March, they would not promise Union the steel. When the contractor was informed of this fact, he awarded the job to Bethlehem, who agreed to complete by April.

Department of Employment Building Testimony

Mr. Gohl, head of Bethlehem's fabricating operations on the West Coast, was a deposition witness who died before trial. His deposition as read at the trial commences at R. 3310. The District Judge excluded testimony concerning the Department of Employment Building summarized at R. 728, as follows:

> "This 2,900 ton job was awarded to Bethlehem as low bidder on a direct bid to the State of California. The job was bid without fabricating profit. Bethlehem claims that it made an error of $45,000 on its bid as a result of a mistake of the Estimator, Bob Greece. See deposition of Gohl, pages 49 to 52. This job was bid in a time of relative free supply of steel and shows that Bethlehem cut their bid to no fabricating profit, or even a loss, in order to get jobs under these conditions."

Similarly, Gohl's deposition was excluded at R. 3330 that during 1946-1949 his fabricating division was able to get all the steel that it needed. This was a prejudi-

cial exclusion when contrasted with plaintiff's experience.

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7. ADMISSIBILITY OF EVIDENCE OF EVENTS SUBSEQUENT TO FILING OF THE COMPLAINT.

The Court erroneously denied admissibility of evidence of events subsequent to filing of the complaint showing damage and intent, motive, plan and design.

(Rule 43, Federal Rules of Civil Procedure.)

The original complaint herein was filed November 28, 1955. (R. 3.) Trial of the case did not commence until July 23, 1959. At the time that the complaint was filed plaintiff had been awarded contracts on certain jobs which are listed in the Appendix A to the pre-trial order of June 19, 1959. (R. 775.) Because of the delay in obtaining steel from the defendants and because of the complexities of the jobs themselves, none of these jobs was completed at the time of the filing of the complaint herein. Because of the allocation of steel to the plaintiff interminable delays were encountered in completing those jobs, some of which were not actually completed until 1957. The defendants took depositions and obtained complete records of all of the files of the plaintiff as late as 1958, spending literally weeks in the records and files of plaintiff and in examining all of the top personnel of plaintiff. Note the docket entries listing the filing of these depositions on October 29, 1958, beginning on the last two lines of R page 3909 and continuing over to the top of page 3912. Even a casual inspection of the depositions them-

selves shows as of the year 1958 defendants were completely aware of the details of these jobs and had been allowed a complete discovery which did not have any limit to its scope so far as time was concerned. The Court ruled in its pre-trial order, par. 3 (R 772), that plaintiff could not recover damages in this action for any acts or conduct of defendants subsequent to November 28, 1955. In the same pre-trial order, paragraph 9 (R 773), and at a subsequent time during the course of trial (R 1520), the Court denied plaintiff's motion for leave to file a third amended and supplemental complaint.

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8. COMPARTMENTALIZING THE TESTIMONY.

The Court cut the evidence off so that the conspiracy could not be looked at as a whole but was rather dismembered and viewed separately and tightly compartmentalized, contrary to the holdings in:

U. S. v. Patten, 226 U.S. 525 at 544;

Continental Ore Co. v. Union Carbide Co., 370 U.S. 690 at 699.

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9. FAILURE TO ALLOW AMENDED AND SUPPLEMENTAL COMPLAINT.

Then, after so ruling erroneously to limit the plaintiff, the District Court compounded the error by refusing to allow the filing of an amended and supplemental complaint and the Court below affirmed. This was error.

Rule 15 (d), Federal Rules of Civil Procedure requires a liberal, not a strict approach to the amending and supplementing of complaints.

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10. TAXATION OF COSTS.

The Court erred in allowing and taxing costs to such an outrageous extent as to discourage any anti-trust plaintiff from proceeding in a case of this kind.

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11. THE RULE OF INFERENCES

Even though this was a decision on a summary judgment the trial Court and the Court of Appeals drew the inferences instead of allowing the jury to do so in violation of the decisions of this Court in:

Tennant v. Peoria and Pekin R. Co., 321 U.S. 29;

Lavender v. Kurn, 327 U.S. 645;

American Tobacco Co. v. U.S., 328 U.S. 781, 809;

U.S. v. Paramount Pictures, Inc., 334 U.S. 131, 142;

Klors, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207;

Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699.

CONCLUSION

The decision of the Court of Appeals in this case is but another step in a slow retreat from an unaccountably hostile attitude of the Ninth Circuit toward private treble-damage actions. Thus in *Radovich v. National Football League*, 352 U.S. 445, this Court reversed dismissal of the case in the pleading stage. In *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, this Court reversed dismissal in the discovery stage. In *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, this Court reversed denial of a right to trial by jury in a private antitrust case. In *Continental Ore Co. v. Union Carbide Corp.*, 370 U.S. 690, the Court below attempted to justify an erroneous charge to the jury by the supposition that a directed verdict should have been entered at the conclusion of the evidence and this Court reversed.

The instant case is but another instance of an attitude of judicial discouragement of treble-damage actions by the Ninth Circuit. Certiorari should be granted and the Court below instructed to grant a new trial to the plaintiff.

Dated: September 4, 1963.

Respectfully submitted,

CLIFTON HILDEBRAND,
JULIAN CAPLAN,
By JULIAN CAPLAN,
Attorneys for Petitioner.

(Appendices "A", "B", "C" and "D" Follow)

Appendices A, B, C and D

Appendix "A"

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEPENDENT IRON WORKS, INC., a corporation,

Appellant,

vs.

UNITED STATES STEEL CORPORATION, BETHLEHEM PACIFIC COAST STEEL CORPORATION, BETHLEHEM STEEL COMPANY, and KAISER STEEL CORPORATION,

Appellees.

No. 16,731

July 16, 1963

Appeal from the United States District Court for the Northern District of California Southern Division

Before: HAMLEY, HAMLIN and KOELSCH, Circuit Judges.

KOELSCH, Circuit Judge:

In this private antitrust suit for treble damages the District Court, concluding that there was no substantial evidence tending to establish liability on the part of the defendants, directed the jury to render verdicts against plaintiff and thereafter dismissed the action. Plaintiff has appealed.[1] The opinion of the District Court appears in 177 F. Supp. at 743.

[1] The issues of liability and damages were severed for hearing. After plaintiff completed its proof on liability the defendants moved for directed verdicts, and the court stated the motion would be granted, but only after plaintiff had rested defendants' case. However, the parties then stipulated plaintiff's proof on damages and thereupon further stipulated that the jury rendered verdicts against the plaintiff pursuant to the court's direction.

and much earlier than Kaiser. To the extent that the defendants possessed and maintained fabricating plants in combination with their business as producers they were organized alike and had extended their operations into another field of business. But those facts are innocuous or, as the Supreme Court unequivocally declared in *United States v. Columbia Steel Co.*, 334 U.S. 495, 525 (1948), "vertical integration, as such without more, cannot be held violative of the Sherman Act."

Plaintiff vigorously asserts: (a) that all defendants supplied their own fabricating divisions with "huge tonnages" of steel while "starving" the independent fabricators in times of shortage; (b) that, by sacrificing their fabricating profit in bidding, they "squeezed the independent fabricator so that he could not obtain jobs" in times of free supply; and (c) that the defendants also, "as a regular practice," unfairly competed by "kiting bids" for subcontracts (that is, lowering their prior quotations to the general contractor after the close of the bidding) in order to take jobs away from competitors.[8] On these facts plaintiff concludes that "the scheme of defendants was to impair appellant's ability to compete rather than some lawful market objective."

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[8]Plaintiff explains that underbidding was economically feasible because defendants "are making a dual profit—one profit on the sale of the plain material and a second profit on the fabrication of the plain material. Appellees can sacrifice their fabricating profit to insure that they will make a profit on the plain material." The authors of a well reasoned article [Kessler & Stern, Competition, Contract, and Vertical Integration, 69 Yale Law Journal 1 (1959)] violently disagree with plaintiff's contention as a valid economic proposition. But of course we are not interested in the merits of that matter; what is important and fatal to this facet of plaintiff's argument is that at the very most the evidence shows Bethlehem Pacific underbid with respect to what plaintiff referred to as the "building for the Department of Unemployment" in Sacramento, California. Bethlehem Pacific bid the job at a loss. But even assuming this isolated instance constituted an unfair business practice, it in no way involved the other defendants.

The proof relied upon to show "kiting" likewise disclosed nothing for the jury to appraise. Plaintiff bid 835 jobs during 1955, yet it could cite only two instances of so-called "kiting." Thus on one occasion Kaiser made a tardy bid in an attempt to secure a subcontract for which plaintiff was the low bidder, and on another occasion Bethlehem Pacific reduced its offer after the bidding was closed. But in both instances plaintiff was awarded these subcontracts.

It is questionable whether an inference of conspiracy can be drawn from the fact that several suppliers favor their wholly owned subsidiaries in the distribution of a scarce product since such action, even as a general practice, is not inconsistent with normal independent business methods. *Dipson Theatres, Inc. v. Buffalo Theatres, Inc.*, 190 F.2d 951 (2d Cir. 1951), *cert. denied*, 342 U.S. 926 (1952). But we need not consider that question because no favoritism is apparent from the record. Defendants' plants were placed under restrictions equivalent to those imposed on the plaintiff. The restrictions were rigorously adhered to, even though they prevented defendants' plants from operating at anywhere near capacity. As a result the defendants were unable to bid or accept a number of jobs because of the scarcity of structural steel.[9]

Much of the plaintiff's evidence consists of statistics which indicate that the defendants shipped the plaintiff considerably less steel in 1955 than they shipped to their own division plants. But isolated figures and unadjusted comparisons cannot support the asserted discriminations, and any illusions that they create are quickly dispelled, for it also appears that defendants' fabricating plants were much larger than the plaintiffs', they carried on more extensive and varied operations than the plaintiff's and their individual fabricating capacities were far greater. To illustrate: the 1955 plant capacity of U. S. Steel's Consolidated Western Division, whose receipt of "huge tonnages" was repeatedly stressed by plaintiff, was estimated at 324,000 tons per year; Bethlehem Pacific's plant capacity was given as 51,500 tons and Kaiser's, 48-60,000 tons. On the other hand, plaintiff's estimated capacity was 15,555 tons.

Although plaintiff obtained less steel from the defendants in 1955 than in 1954, this was plainly due to the fact that plaintiff placed practically no orders until mid-year after defendants' rolling schedules were completely booked far ahead. Even so, it does appear that for the entire year 1955 plaintiff received more

[9] The defendants' shipments to their plants did not represent a significant increase over the shipments which were made during times of free supply of steel. To the contrary, Bethlehem Pacific's and Kaiser's western shops received less steel from their parents in 1955 than they had customarily received in most prior years.

steel from defendants than in some prior years,[10] that the great bulk of the defendants' shipments to the West Coast went to independent fabricators,[11] that other fabricators were also placed on allocation and that over the years there has been a steady decrease in the defendants' shipments to their own plants but a corresponding increase in the percentage of defendants' production and tonnages of steel sold to other users.

In sum, the inference of a conspiracy among the defendants might have been permissible if plaintiff had submitted proof that the defendants' policies of distribution were aimed at plaintiff alone or that they were a mere subterfuge which, although ostensibly adopted in order to effect an equitable division of structural steel among fabricators generally, in fact resulting in the defendants securing a significantly greater share than they had received in the past. But this plaintiff failed to do.

It was stated earlier in this opinion that the defendants Bethlehem and Bethlehem Pacific were subsidiaries of Bethlehem Steel Corporation, that Bethlehem Pacific acted as sort of distributor for Bethlehem in the western United States, and that fabricators there were required to order from Bethlehem Pacific the eastern structural shapes and heavy plate which Bethlehem alone produced. Plaintiff's separate claim against these sister corporations is based upon the premise that the two participated together in manipulating this business arrangement in a manner which enabled Bethlehem Pacific to stifle competition between its own

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[10] Plaintiff's purchases

in tons from:	1955	1954	1953	1952	1951	1950
U.S. Steel	3659	4034	2892	4521	1263	559
Bethlehem Pacific	2733	4943	6535	4157	1924	2459
Kaiser	1072	3720	3138	1155	1304	195

[11]

	Shipments to plaintiffs.	Shipments to own divisions.	Shipments to other fabricators.
U.S. Steel	3659	71,367	410,747
Bethlehem Pacific	2733	35,154	166,633
Kaiser	1072	11,464	50,860*

*The tonnage actually shipped is not disclosed but Kaiser offered the amount indicated in the chart to customers in the last eight months of 1955.

fabricating division and independent fabricators. Specifically plaintiff contends that "the allocation system imposed [by Bethlehem Pacific] upon the West Coast independent fabricators was worked out by conspiratorial, cooperative action."

Here again, although the particular charge is made against only two of the several defendants, plaintiff likewise relies upon the same type of evidence (and much the same evidence) that it urges establishes the larger conspiracy.

There is a measure of similarity evidenced in the policies these defendants adopted with respect to distribution of structural steel, and there is the additional fact that they were subsidiaries of a larger corporation and hence under common ownership; that is the most that can be said of the evidence tending to support plaintiff's claim. This falls short of the proof required to make out a prima facie case of conspiracy.[12]

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[12]We have carefully examined the entire record, including the portions cited by plaintiff. What appears is that Bethlehem suggested that Bethlehem Pacific limit customers' purchases to the amounts each had purchased in 1954; however the evidence is uncontroverted that Bethlehem Pacific did not follow this suggestion (see note 5 *supra* and accompanying text). And plaintiff also mistakes the evidence relative to the allocations of steel to fabricators. Plaintiff argues that during 1955 the tonnage of steel sent by Bethlehem to Bethlehem Pacific shops was grossly disproportionate to the amount made available to the trade generally, and that in the third quarter of 1955 Bethlehem Pacific's shops received 13,652 tons of wide flange shapes; it then argues that independent fabricators in the entire area received but 9000 tons of this type of steel. This latter figure is arrived at through a clear misunderstanding of the testimony of Jesse V. Honeycutt, Bethlehem's Vice President in charge of sales. Honeycutt stated that Bethlehem's shops nationally used "16 or 17 percent" of the wide flange that Bethlehem produced. He then said that approximately 60% of all steel shipped to Bethlehem Pacific's fabricating shops consisted of wide flange beams; but plaintiff apparently understood the testimony to be that 60% of *all* shipments of wide flange beams to that area were to Bethlehem Pacific's shops. If plaintiff's version of the testimony was correct, then of course the total tonnage of wide flange material was 22,753 tons of which Bethlehem Pacific kept 13,652 tons and sold the remaining 9,101 tons. A further exhibit, however, shows that Bethlehem shipped to "western trade customers" in the quarter mentioned 39,847 tons of "structural shapes."

We have already noted that business parallelism in itself is not indicative of a Sherman Act violation and the Supreme Court has made the same observation with respect to the fact of common ownership of corporations which transact business with one another. Thus, as said in *United States v. Columbia Steel Co.*, 334 U.S. 495, 522-3 (1948) "in discussing the charge • • • [that a close working arrangement between the parent and the subsidiary corporation was evidence of an illegal combination] we said that the fact that the conspirators were integrated did not insulate them from the act, not that corporate integration violated the act. • • • When other elements of Sherman Act violations are present, the fact of corporate relationship is material and can be considered in the determination of whether restraint or attempt to restrain exists."

In its complaint plaintiff alleged a price fixing conspiracy, but offered no proof that defendants' prices were unreasonable or higher than those of other producers. On appeal plaintiff urges that the evidence did show "substantial price uniformity" and that this is additional proof that defendants conspired against plaintiff in making distribution. We have grave doubts concerning the validity of plaintiff's legal premise but need not resolve them here. Similarity of prices in the sale of standardized products such as the types of steel involved in this suit will not alone make out a prima facie case of collusive price fixing in violation of the Sherman Act, the reason being that competition will ordinarily cause one producer to charge about the same price that is charged by any other. *United States v. International Harvester Co.*, 274 U.S. 693, 708-09 (1927); *Cement Mfgrs Protective Ass'n v. United States*, 268 U.S. 588 (1925).

Of course patterns of uniformity coupled with other related facts, as for example those in *American Tobacco Co. v. United States*, 328 U.S. 781 (1946), which disclosed that the "Big Three" of the cigarette industry somewhat simultaneously made a series of identical price changes, both up and down, without any economic justification and where the immediate effect was to stifle competition by smaller manufacturers, may constitute sufficient circumstantial evidence to support a factual conclusion that the acts were done in concert. But no comparable circumstances or

other facts which cast a conspiratorial quality upon the defendants' pricing policies are revealed by this record. To the contrary the evidence at once shows both a decided lack of uniformity and an absence of interdependence among the defendants in this respect.[13]

By characterizing the sales and purchases of steel between defendants as "trades" the plaintiff attempts to impart a conspiratorial significance to what were in fact—so far as this record

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[13] For example, take the testimony of E. T. Weir, Board Chairman of National Steel Corporation, J. L. Ashley, a vice president and general manager of, Kaiser, and C. F. Borden, Kaiser's Vice President for sales, which plaintiff stresses.

Weir's statements in substance were that U. S. Steel generally took the lead in making prices but "that doesn't mean that there has not been a cutting of prices and things of that kind" by other producers; those of Ashley were to the same effect with the addition that Kaiser generally met competition although prices for its products often varied from those of other producers; Borden's were essentially the same as the others and further disclosed a significant instance in 1948 when Kaiser had charged substantially more ($30.00 per ton) than the others for one kind of ordinary structural steel. In addition there is the testimony of C. D. Anderson, plaintiff's own purchasing agent who, after acknowledging that the difference of $1.00 per ton was material in determining from whom to buy, admitted what the mill base prices charged by the respective defendants for the types of material during the period in question was as shown in the following table:

Mills and Location	Wide Flange & Structural	Plate
Bethlehem	Per Ton	Per Ton
Bethlehem, Pa.	$ 86.00	....
Lackawanna, Pa.	86.00	....
Johnstown, Pa.	86.00	....
Seattle, Wash.	....	$103.00
U. S. Steel		
Munhall, Pa.	$ 85.00	$ 84.50
So. Chicago, Ill.	85.00	84.50
Clairton, Pa.	85.00	84.50
Torrance, Calif.	99.00	85.50
Pittsburg, Calif.	....	84.50
Geneva, Utah	....	84.50
Kaiser		
Fontana, Calif.	$105.00	$ 97.50

shows—no more than ordinary business transactions.[14] At least there is nothing of substance to suggest such reciprocity, for although each defendant was vertically integrated each maintained a separate and wholly autonomous division to carry on the business of production and that of fabrication and construction. And it appears the distinction was observed in practice; thus distribution of the plain material was under the sole control of the production division, which decided to whom material should be sold, and the fabricating division decided from whom to buy. All the defendants readily admitted that they sold each other material, and during the course of his examination Kaiser's sales manager actually volunteered the statement that Bethlehem Pacific was "a very fine account." But there was no direct testimony or any fact or circumstance tending to show that the defendants in their mutual dealings treated each other in any way except as buyers and sellers dealing at arm's length. Sales by one producer-fabricator in no way appeared geared to or conditioned upon purchases from another, nor does it appear that one party ever extended treatment to another party different from that accorded customers generally. What is apparent is that, if a defendant did

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[14] In the brief plaintiff iterates and reiterates that such were the dealings, saying for example, "Mr. Honeycutt [Bethlehem's vice president in charge of sales] admitted that U. S. Steel trades off to Bethlehem and that they deal in similar amounts to each other. * * * All of this policy of trading off steel among competitors in times of tight supply is contrary to elementary economic principles. * * * Such conduct is not the conduct of true competitors and the jury would be warranted in drawing inferences of collusion and conspiracy from this entire trading-off system." Plaintiff's assertion, like many of its other contentions, is entirely lacking in evidentiary support and such unfounded statements make a review of this record much more difficulty than it otherwise would be. Instead of admitting trades, Honeycutt flatly denied any took place; the suggestion came from counsel, as the following extract from the record demonstrates:

"Q. (By plaintiff's counsel). How about U. S. Steel, does your fabricating shop in Chicago buy from the United States Steel Corporation?

A. (Honeycutt) Yes, sir.

Q. Then do you trade off with U. S. Steel by reason of that, to give them steel where they have a more favorable freight situation in other spots.

A. It isn't what I call a trade-off. We buy from them and they buy from us."

not make a particular product or if because of a difference in freight charges, due to the location of the mill where the product was made, it was cheaper to buy from another producer, then the two dealt with each other, but on the same terms that were extended to all buyers.

Plaintiff's claims, based on charges of monopolization by the defendants severally, merit only brief comment. "Monopoly power" is an essential of such a claim. *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 389 (1956). Whether a defendant possessed this requisite power depends upon the degree of control the defendant could exert in a particular market. *United States v. Consolidated Laundries Corp.*, 291 F.2d 563 (2d Cir. 1961); *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945). And the market is defined both by reference to a type of product or service and the geographical area in which the same is traded; section 2 of the Sherman Act has "both a geographical and distributive significance * * *." *Indiana Farmer's Guide Publishing Co. v. Prairie Farmer Publishing Co.*, 293 U.S. 268, 279 (1934); *United States v. Columbia Steel Co.*, 334 U.S. 495, 510 (1948). Here the trade area was settled by stipulation, but the total amount of trade in structural steel does not appear.

Of course, monopoly power need not be shown in order to warrant a finding of an attempt to monopolize. However, "where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. * * * (Citation omitted). But when that intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result." *Swift & Co. v. United States*, 196 U.S. 375, 396 (1905).

Thus, to make out a prima facie case plaintiff was required to produce proof that a defendant's acts were not "predominantly motivated by legitimate business aims" [*Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 626-27 (1953)], but instead were done in order to gain monopoly power. The acts them-

selves may be such as to suggest an illegal purpose, or they may require the assistance of additional facts; in either event the intent must be reasonably apparent. Here it is not.

The steel shortage in 1955 and its causes have already been mentioned in discussing plaintiff's charges of conspiracy. Much of what was said there is also pertinent to the contention that each defendant was seeking "monopoly power." Rationing appears to have been no more than a move to meet the sudden change in the current business climate. The effect was to divide production among all customers, including the defendant's own fabricating divisions, equitably and in a manner which maintained relative equality among all fabricators; neither the policies nor the manner in which they were carried out permit any implication that a defendant resorted to rationing in a calculated effort to exclude from competition independent fabricators. True, some fabricators might have profited more without artificial controls but, under the circumstances, that fact does not suggest an intent to monopolize.

In addition to its argument that each defendant attempted to monopolize the general market for structural fabrication, plaintiff makes the more limited assertion that the evidence tends to show that U. S. Steel sought to gain control of the market for making freight car underframes and that Bethlehem did likewise with respect to multi-storied buildings. These latter arguments proceed from the fact that the principal producer of Z bars and the principal source of supplies of wide flange beams were respectively U. S. Steel and Bethlehem Pacific. Beyond this point plaintiff's conclusions lack support. We are left to speculate whether there was a distinct economic market for this product and, if so, the extent of that market. In addition, the allocation systems imposed by these two defendants do not alone evidence intent to monopolize and we see no additional proof that is relevant to that issue.

It appears that during 1955 U. S. Steel obtained three orders from Southern Pacific Company for 2500 freight car underframes, and plaintiff one for 500 frames. But in each instance the contracts were awarded to the best bidder, after competition, in full compliance with the provisions of a statute and regulations of the Interstate Commerce Commission. Moreover, plaintiff makes no

complaint that U. S. Steel's success was due to grossly unfair pricing or a resort to unfair business practices.

With respect to the practices of Bethlehem Pacific the same observations must be made. And we fail to see any force to plaintiff's argument that Bethlehem Pacific was able to secure "most" of the multi-storied buildings jobs and, on one occasion, was given a large contract without competitive bidding. Business success, without more, does not indicate an intent to monopolize.

Section 10 of the Clayton Act, on which plaintiff's third cause of action is based, makes it unlawful for a common carrier to purchase supplies in an amount of more than $50,000 from another corporation when the same person is a member of the board of directors of both corporations; an exception is permitted if the purchase is made the subject of competitive bidding and the bid most favorable to the carrier is the one accepted. The section contains a further provision that "Any person who shall, directly or indirectly, do or attempt to do anything to prevent anyone from bidding, or shall do any act to prevent free and fair competition among the bidders or those desiring to bid, shall be punished as prescribed in this section * * *."

The keystone of plaintiff's claim is the fact that during 1955 James B. Black was a director of both the Southern Pacific Company and U. S. Steel. During that year Southern Pacific on several occasions solicited bids for the underframes of freight cars which it intended to assemble in its own shops at Sacramento, California. It awarded all the contracts to U. S. Steel, except on the last occasion; at that time plaintiff was the low bidder but Southern Pacific's purchasing agent, doubting that plaintiff could secure enough material to fill the order, awarded a contract for only 500 of the 1500 frames to plaintiff and placed the remainder of the order with U. S. Steel.

Plaintiff does not contend that Southern Pacific failed to comply with all bidding procedures required by this statute and the supplemental regulations of the Interstate Commerce Commission, or that the bids which it accepted were not the most favorable. Rather, plaintiff directed its complaint against U. S. Steel and took the position that by making "impossible allocations" of shapes—and hence Z bars—U. S. Steel committed a violation of

the portion of Section 10 quoted above, and for which it was liable in a civil action for damages.[15]

Section 10 represents a Congressional effort to protect common carriers from being over-reached in purchases of securities, supplies or other articles of commerce from other corporations in those instances where the interests of their own officers and representatives are conflicting. Dealings between the two such corporations are not prohibited, but the object of fairness is thought to be achieved by requiring that the purchase be made the subject of competition and be from the corporation whose bid is most favorable to the carrier. *Minneapolis & St. L. Ry. v. United States*, 361 U.S. 173, 190 (1959).

Plaintiff's contention, if correct, would engraft on the section the additional condition of cooperation between bidders. As U. S. Steel points out, "section 10 nowhere contains any provisions creating obligations on the part of a supplier to deal with competing suppliers, to extend favors to them or to refrain from doing something in the normal course of business that somehow might hamper them." and we should add that nothing in its legislative history indicates such a construction.[16]

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[15]By motion and answer U. S. Steel raised as an issue of law the question of whether a private cause of action for stifling bidding lies under this section—a question which was left unanswered below because in the opinion of the trial court the record did not show that U. S. Steel was guilty of any unlawful conduct. We agree with that appraisal of the evidence and go no further.

[16]Section 10 was the outgrowth of intensive investigation by the Interstate Commerce Commission which brought to light the fact that a number of railroads had been swindled of vast sums in private deals with their own officials because of the fertile opportunities for uninhibited partiality in such transactions. Financial Investigation of New York, N.H. & H.R.R., 31 I.C.C. 32 (1914); Five Per Cent Case, 31 I.C.C. 351, 413-14 (1914). The tenor of the findings of the Investigating Committee of the Interstate Commerce Commission is reflected in the following passage contained in the report of "Financial Investigation of the New York, N.H. & H.R.R.," supra at p. 61:

"Large purchases without bids.

Purchases of cars and coal are two large expenditures that railroads make. The New Haven purchased cars almost exclusively from James B. Brady without competition and to the extent of some $37,000,000. Mr. Brady as a witness made no secret of his generosity to the officials with

Plaintiff further assigns as error the court's rulings regarding the admission of evidence.

Part of such evidence consisted of proof of the manner in which U. S. Steel and Bethlehem had distributed steel to plaintiff and others prior to 1955, the period in issue. Plaintiff's counsel, at a pre-trial conference, stated that this would be offered as collateral proof of plaintiff's charges of conspiracy and monopolization[17] and that it related to 28 jobs carried on from 1950 through 1954. The judge, however, demurred, observing that the evidence was of limited use and that its introduction would require a tremendous amount of trial time. Thereupon counsel, stating that they could reduce the number, selected nine of the jobs initially proposed. However, the judge considered that nine were too many, and, by pre-trial order, limited plaintiff to proof of two—the so-called 13th Street Freeway job undertaken by plaintiff in 1953, and the University of California Teaching Hospital job performed by the Moore Dry Dock Company.

The admission of collateral evidence is a matter addressed to the discretion of the trial judge [*United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 230 (1940)], and we are clear that here the rulings complained of did not constitute an abuse of discretion.[18]

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whom he had business. His methods were justified by him on the ground that the officers of the New Haven were old friends.

Locomotives were purchased from a company in which a director of the New Haven was also a director. Many supplies obtained by the New Haven were from companies having directors who were also directors of the New Haven.

Corporate economy is not practicable where gifts and obligations arising from friendship tend to obscure duty."

[17]It will be remembered that at no time did plaintiff charge that Kaiser was party to any conspiracy prior to 1955.

[18]Even the addition of the proof respecting these two jobs adds nothing to plaintiff's charges of conspiracy. Plaintiff was formally awarded the subcontract for the Freeway job on November 25, 1952. The structure required both wide flange and plate, principally the latter. Plaintiff's source of supply for plate was ordinarily U. S. Steel and Kaiser, but when it experienced difficulty in securing material it also turned to Bethlehem Pacific. Prior to that time plaintiff's largest annual purchase of plate from Bethlehem Pacific had been 70 tons in 1950; its average annual purchase for the eight preceeding years had been 36½ tons; yet during 1953 Bethlehem Pacific sold plaintiff 2937 tons of steel, which

In the words of Justice Holmes, the reason for excluding such evidence is "a purely practical one,—a concession to the shortness of life." *Reeve v. Dennett*, 145 Mass. 23, 28, 11 N.E. 938, 944 (1887). It is manifest from the transcript of the pre-trial conferences, where the subject was discussed at length, that an excursion into each of these incidental matters could and probably would result in a tremendous proliferation of proof which would literally overwhelm the jury with diversionary facts and extend the trial interminably. The Judicial Conference of the United States, in its Report on Procedure in Anti-trust and Other Protracted Cases (1951), has frowned upon a liberal exercise of judicial discretion in allowing collateral proof saying "Such evidence as is merely 'possibly helpful', or which merely supplies 'atmosphere' or 'background', may be rigidly excluded." a view to which we heartily subscribe.

Moreover, in addition to conservation of judicial time, there was a further factor in this particular suit that the trial court

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exceeded by 821 tons the amount purchased from Kaiser whom plaintiff stipulated "met the requirements of * * * [plaintiff] as * * * [plaintiff] called on them to do so," in quantity, in time, and also was a good, adequate and prompt supplier" continuously until February 1, 1955.

The Teaching Hospital job of the Moore Dry Dock Company extended over the years 1950, 1951 and 1952. Plaintiff's evidence involved only the defendant Bethlehem Pacific's alleged discriminatory withholding of wide flange. But here too the evidence runs counter to the charge. Before Moore bid the job Bethlehem Pacific had indicated a willingness to supply Moore with needed material. But immediately after Moore was awarded the contract on July 10, 1950 the Korean War broke out, bringing with it a shortage followed by governmental restrictions. Moore was not only unable to secure priorities but the National Production Authority cut back the availability of steel for hospitals and some other types of buildings. Nevertheless in each year that Moore was engaged in that construction Bethlehem Pacific's deliveries to Moore on the average were three times greater than in any of the preceding four years when there was no shortage. We fail to understand how the mere fact that Bethlehem Pacific was itself able to construct the frame for a building before Moore could complete its job would tend to support a charge of a Sherman Act violation; and when this fact is placed in proper perspective it is clear that no such inference can arise. Bethlehem bid and was awarded its job after the onset of the war and in the light of the government restriction; the job was smaller than Moore's, and Bethlehem Pacific, like Moore, was also late in completing the work.

could properly consider in arriving at its ruling. A number of the 28 jobs were those awarded plaintiff. Prior to the commencement of the suit, plaintiff had initiated a series of actions against U. S. Steel, Bethlehem Pacific, and others, seeking damages for anti-trust law violations. These actions had culminated in a settlement by the terms of which plaintiff released the defendants from all claims up to January 1, 1955; while the release would not render the facts constituting such claims inadmissible, it did nullify them as the basis for an award of damages. But how far a jury in a case of this magnitude could keep that fact in mind, although carefully admonished to do so, is at least problematical.

Another item of pre-1955 proof which the plaintiff now urges should have been admitted rather than excluded by the court's pre-trial order was the deposition of one Walter B. Thomson. The contents appear irrelevant, but we need not pass on that objection because the record clearly shows that plaintiff invited the ruling. When the deposition was under discussion at a pre-trial conference the court commented that it appeared Thomson was not engaged in structural fabrication but was seeking to enter into a different branch of the steel business than plaintiff—that is, warehousing of steel and manufacturing of tanks; and that his operations would be carried on in and around Dallas, Texas, outside the trade area involved in this suit. Thereupon counsel spoke up saying "Why not limit it, then, your Honor, to the local people, Moore Drydock and their experience, and Herrick Iron Works and their experience, and Murphy—."

The pre-trial order further rejected other items of pre-1955 proof, consisting of two documents duly authenticated by the Archivist of the United States as copies of records of the War Production Board. Defendants' objection to them was general and that they constituted hearsay.

The first of these proposed exhibits was titled "Summary of Meeting" (held March 27, 1946) of the Iron-Steel Advisory Committee of the Civilian Production Administration of the United States. It contained the statement that the purpose of the meeting was "to consider ways of alleviating various critical problems that have arisen as a result of the present steel shortage;" that Charles Halcomb, head of the Steel Branch was the Government

Presiding Officer; and that John D. Small, Administrator of the C.P.A., addressed the group, which consisted of the Committee composed of representatives of numerous steel companies, (including these defendants) and participated in the ensuing discussion. It contains a further recital that "The industry is voluntarily following a pattern of distribution based on historical usages during 1940-41 and is doing its best to divide available supplies fairly among traditional users, the Committee said."

The second of the proposed exhibits is titled, "Interim Report on Operations," submitted by the Steel Branch of the same agency, dated October 14, 1946. It contains a statement similar in tenor to the one quoted from the Summary. Neither document is signed.[19]

We find it unnecessary to appraise the probative worth of either document because neither contained anything but inadmissible hearsay. The official document exception to the hearsay rule is codified as 28 U.S.C. § 1733.[20] "Generally stated, the rule is that all documents prepared by public officials pursuant to a duty imposed by law or required by the nature of their offices are admissible as proof of the facts stated therein. * * *" [citation omitted]. Since the official documents are a substitute for the

[19] These documents do not appear in the printed record. By virtue of our Rule 17(6) plaintiff was required to designate (and cause to be printed) "all of the record which is material to the consideration of the appeal" and we would be fully justified in disregarding this assignment of error. Sampsell v. Anches, 108 F.2d 945 (9th Cir. 1939). However, we decided not to invoke the extreme penalty and did ferret out the two documents, even though they required us to spend a considerable amount of time rummaging through a great mass of unsorted and loose documents. Our indulgence in this case should not be regarded as a forecast for other cases. Apparently the particular passage in the minutes which plaintiff desired to get before the jury was to the effect that the steel industry had adopted a voluntary alleviation system; a similar statement also appeared in the Report.

[20] 28 U.S.C. § 1733 (1958). "Government records and papers; copies.

(a) Books or records of account or minutes of proceedings of any department or agency of the United States shall be admissible to prove the act, transaction or occurrence as a memorandum of which the same were made or kept.

(b) Properly authenticated copies . . . shall be admitted in evidence equally with the originals thereof."

personal appearance of the official in court, it is generally held that such documents, to be admissible, must concern matters to which the official could testify if he were called to the witness stand. • • • [citation omitted]. Thus, this circuit • • • [has] held that the facts stated in the document must have been within the personal knowledge and observation of the recording official or his subordinates, and that reports based upon general investigations and upon information gleaned second hand from random sources must be excluded." *Olender v. United States*, 210 F.2d 795, 801 (9th Cir. 1954).

The foundation essential to the admission, as official documents, of these proposed exhibits was entirely lacking. Granting that the Civilian Production Administration required that minutes be kept of meetings of its Industry Advisory Committee and that the making of reports, such as the one tendered by plaintiff was one of the duties of that agency,[21] nevertheless it was incumbent upon plaintiff to establish who was responsible for their preparation in order to determine whether they were "within the personal knowledge and observation of the recording official or his subordinates" and whether the same were accurate and correct accounts of what

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[21] Plaintiff points to specific administrative authorization for the taking of minutes contained in War Production Board, General Administration Order No. 2-141, which was adopted by the Civilian Production Administration on November 5, 1945 and reads in part as follows:

"Rules applicable to meetings with groups of industry representatives.

. . . .

Section 4. Procedure for Establishing and Using Industry Advisory Committee

. . . .

.03 Meetings of Industry Advisory Committees.

6. Presiding Officer's Agenda.

Minutes. The government presiding officer shall preside over all meetings of a committee. He shall cover each topic on the agenda of the meeting . . . and shall be responsible for the keeping of minutes of each meeting. Minutes may be a summary of important matters discussed at the meeting and need not be a full stenographic record . . ." Defendants appear to be critical of the purported minutes because they are "simply a summary." The point may be well taken because here the content is replete with conclusions and is very "sketchy." This may be because, as the Administrator explained, the practice was for chairmen to have "a recording secretary who was generally a stenographer, taking not verbatim records but notes of the general tenor of the discussion."

occurred. Here there was nothing to show who kept the "minutes" or who authorized the report; in addition it was not shown when they were prepared or the source of the writer's information. Small was not only unable to provide this foundation, but he emphatically denied that the version contained in the minutes truly or correctly reflected any statements regarding the steel producers' policies and he further stated that at no time during the meeting was anything said about an agreement among producers.

Similarly, Halcomb was unaware of the existence of the Report and he too declared that the same was incorrect in respect to the portion under consideration.

Other items of evidence which the court excluded related to violations of the anti-trust laws which the plaintiff asserts U. S. Steel committed in the period after November 28, 1955, the date the action was commenced, and principally jobs to construct freight car underframes for the Southern Pacific Company and Pacific Fruit Express Co.

The substance of this evidence *apparently*[22] would have been to the effect that in early 1956 plaintiff, although the low bidder, was not awarded a contract because the Southern Pacific Company doubted plaintiff would be able to buy enough steel from U. S. Steel, and likewise that on several occasions in that year

[22]We italicize the adverb "apparently" to emphasize our extreme difficulty in determining what plaintiff's evidence would have been. Although in plaintiff's brief counsel refers to "offers of proof" the record references are to mere arguments to the court and long colloquies during the course of which plaintiff's counsel did make some factual statements; but it is impossible to ascertain from them with any degree of certainty what evidence plaintiff would have attempted to adduce. The so-called offers fall far short of the requirements that they "be offers of relevant proof, specific, [and] not so broad as to embrace irrelevant and immaterial matter * * *" [Central Pac. R.R. v. California, 162 U.S. 91 (1896)]; indeed it is doubtful that the trial court understood them as offers at all for it repeatedly urged plaintiff to make offers of proof.

Following appeal plaintiff made a motion in this court to supplement the record by adding some 31 pages of its Trial Brief which it is asserted was in fact tendered to the trial as an offer of proof. The motion was taken under advisement and is now denied. The transcript clearly shows that counsel are mistaken in their belief that the material was made the subject of any such offer.

and in 1957 plaintiff was prevented from bidding various jobs because U. S. Steel refused to fill plaintiff's orders. It is of course elementary that plaintiff could not recover damages for injuries resulting from tortious conduct not comprehended by its complaint. In *The Flintkote Co. v. Lysfjord*, 246 F.2d 368 (9th Cir. 1957) cert. denied, 355 U.S. 835, a case quite similar to the one at bar, this court, during the course of an extended discussion concerning the nature of and basis for a claim founded on a conspiracy, declared, "Plaintiff's injuries were not caused just by the announced refusal but rather resulted from the explicit refusal coupled with the implied persistence in the announced course of conduct." [*Id.* at 395] a course which defendant "was under no legal duty to" [continue but] • • • on the contrary, • • • was at all times completely free to reconsider • • •." *Ibid.* And we quoted with approval the following passage from *Momand v. Universal Film Exchange, Inc.*, 43 F. Supp. 996, 1006 (D. Mass. 1942).

> "Each time the plaintiff's interest is invaded by an act of the defendants, he has a new cause of action. For that particular invasion he is at once entitled to recover as damages, not only for the injuries he suffers at once, but also for those he will suffer in the future from that particular invasion, including what he has suffered during and will suffer after the trial. Lawlor v. Loewe, 235 U.S. 522, 536, 35 S.Ct. 170, 59 L.Ed. 341. But he can not at once recover for anticipated invasions, even though they are of the same general character as those he has already sustained."

Accord, Connecticut Importing Co. v. Frankfort Distilleries, 101 F.2d 79 (2d Cir. 1939).

These principles are applicable here. Plaintiff could recover only for such damages as were the consequences of the acts of a defendant or the defendants committed prior to the time the complaint was filed; plaintiff's proof evidently would have been of subsequent acts. We are of course aware of the well settled proposition that proof of other acts is relevant and admissible provided they are so related in character and time to the transaction in issue as to tend to show the existence of a plan or the character of the latter. *Wood v. United States*, 41 U.S. 341 (1842); *N.L.R.B. v. Pacific Greyhound Lines, Inc.*, 91 F.2d 458 (9th Cir. 1937), *rev'd*

on other grounds, 303 U.S. 272 (1938). And the Supreme Court has held this limitation on the general rule excluding collateral proof applies to subsequent as well as prior acts. *FTC v. Cement Institute*, 333 U.S. 683, 704-05 (1948). Here the evidence being beyond the issues was admissible, if at all, only for a very limited purpose. But the record makes clear the fact that during pre-trial discussion and at the trial, plaintiff took the position that this proof (whatever it was) should be allowed as a basis for damages.[23]

On appeal plaintiff may not base error on the fact that evidence offered for one purpose and properly rejected by the trial court may have been admissible for another purpose for which it was not offered. See *Standard Oil Co. of Cal. v. Moore*, 251 F.2d 188, 217-18 (9th Cir. 1957), *cert. denied*, 356 U.S. 975 (1958).

After the case was set for trial the court conducted a final series of pre-trial conferences for the purpose of ascertaining the nature of the proof and to settle the trial agenda. At one of these meet-

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[23] For example, at one pre-trial conference plaintiff's counsel, in arguing the relevancy of past complaint proof asserted: "We merely ask to bring our damages up to date on those overt acts [alleged in the complaint]. They say some of them are two years [out of time]. That again is a masterly attempt to confuse the court. We complained about the car frame job—the whole series of such jobs. We were denied the right to bid on them, to do business with respect to them. They extend over a two-year period but they are simply an accumulation of damages because of the fact that we can't do business in that field." On another such occasion counsel reiterated "On that [the Southern Pacific car frame jobs] it is our contention, as set forth in one of our pre-trial memoranda, that we were knocked out of the car frame business effectively in the year 1955 and hence those bids 157 to 164, which extended into the year 1956 and I believe possibly into 1957, were included in the damage period."

During trial, when objection was made to such proof, plaintiff's counsel in opposition advised the court variously that "It bears on damages, your Honor," and "Now, my thought on this would be, it would be admissible to prove damages . . ."

Plaintiff's erroneous opinion that each of a series of refusals to sell it steel constituted merely a part of a single claim rather than a separate claim may have been induced by plaintiff's practice of relating a number of orders to a particular job. The defendants, however, including U.S. Steel, did not deal with plaintiff on a job to job basis, nor concern themselves with plaintiff's intended use for any particular steel.

ings plaintiff's counsel took the position and asserted that plaintiff was not only entitled to recover for injuries resulting from wrongful acts committed up to the date the complaint was filed, but also for injuries resulting from acts subsequently committed in the interim up to the time of trial, an additional period of over three years. The court, however, after carefully and correctly pointing out that in a civil suit brought under the anti-trust laws the injury rather than the conspiracy is the gist of the claim, stated that the commencement of the action marked the cut-off date of any acts for which plaintiff might recover damages.[24]

Before the next meeting, plaintiff filed a formal motion for leave to file a "Third Amended and Supplemental Complaint." In this pleading appeared claims separate from and in addition to those which were initially the subject of plaintiff's action. Even though the new claims were of the same nature as the others, they were based on later acts and hence defendants manifestly were entitled to a fair opportunity to prepare a defense. Plaintiff's counsel vigorously argued that the defendants had already engaged in extensive discovery and taken numerous depositions covering all facts which would in any way be relevant to these additional issues. Defendants' counsel, on the other hand, opposed the motion, pointing out that their entire investigation and preparation had been made to meet the more limited charges. They also urged that plaintiff offered no valid justification for the delay. In addition they took the position that the supplemental complaint was defective in substance, a ground we find unnecessary to consider since

[24]More than a year prior to this conference plaintiff had stipulated that its claims would be based upon defendants' conspiratorial conduct with reference to their supplying of structural steel for 42 specific jobs. It appears, as already stated, that structural steel is in a sense custom made—that is, produced only on order and that orders must be booked on the mills' rolling schedules for future production and delivery. It also appears that when this suit was commenced in November, 1955 some of the designated jobs had just recently been awarded to plaintiff and it had not then ordered material for them, others had only been commenced and little steel had been ordered or was then needed and yet others, although farther advanced, were far from completed and would require steel in addition to what plaintiff had received. In such a situation the advisability of a supplemental complaint seems only obvious.

it is apparent to us that the trial court could have properly rested its ruling on the sole ground that the motion was untimely.

After thoughtfully considering each of plaintiff's remaining points we believe that the only ones having sufficient merit to warrant discussion relate to the matters of expert witnesses and costs.

Plaintiff took the deposition of Theodore John Kreps, a distinguished economist, for use as evidence. Prior to trial, however, the defendants moved for its exclusion on the grounds of irrelevancy, and a judge (other than the one before whom the case was tried) entered this order: "The defendants are charged with a violation of the antitrust laws, not with a violation of scientific principles affecting the conditions and laws of production * * *. The case, therefore, will be tried upon legal principles, not economic ones. Should it become apparent upon the trial that the testimony of an economist would be of assistance to the court and jury, the court will in the exercise of its discretion call an expert of its own or one chosen by mutual consent of counsel. * * * The deposition of Dr. Theodore J. Kreps is stricken from the record." We think that the judge erred in striking the entire deposition. It is true that much of its contents consisted of the deponent's abstractions in the field of economics, together with his opinions on issues of law, but nevertheless some of his conclusions were within the province of a skilled witness and to that extent would have been admissible.

However, it is not apparent that the ruling was in any way prejudicial. Moreover, at the trial plaintiff neither called nor requested the court to call an expert witness, nor did it lay the foundation necessary to the use of the Kreps deposition in order that it might offer the portions which were admissible. See generally Fed. R. Civ. P. 27(a)(4) and 26(d)(3).

With respect to costs, plaintiff contends (1) that the defendants waived their right to any costs at all and (2) in the alternative, that the sums assessed were excessive.

(1) Rule 23 (now Rule 46) of the local Rules of the court below requires a party entitled to costs to serve on his opponent and file with the clerk of the court within five days "after notice of the entry of a judgment" a bill of costs, and makes non-

compliance a waiver of the right; Rule 58 of the Federal Rules of Civil Procedure, in part, provides that "unless the court otherwise directs • • •, judgment upon the verdict of a jury shall be entered forthwith by the clerk • • •. When the court directs that a party recover only money or costs or that all relief be denied, the clerk shall enter judgment forthwith upon receipt by him of the direction • • •. The notation of a judgment in the civil docket • • • constitutes the entry of the judgment • • •."

In the case at bar the judge, immediately following argument, orally announced his ruling granting defendants' motions for directed verdict, and then addressed the clerk, saying "you will then enter a directed verdict in favor of each defendant on each claim to which it is a party." The pertinent docket entries on that date and thereafter read as follows:

> "Aug. 28—Further trial (hearing on motions for directed verdict). Arguments heard and motions granted • • •.
>
> Sept. 30—Filed opinion of Court (motion of defendants for directed verdict granted • • •, • • • Mailed copies to counsel. (Counsel for defendants notified to prepared [sic] judgment).
>
> Oct. 8—Filed statement of plaintiff of reasons for disapproval of form of judgment submitted by defendants.
>
> Oct. 21—Entered judgment filed October 21, 1959 for defendants • • • • • • Mailed notices.
>
> Oct. 23—filed memorandum[a] of costs • • • • • • •"

"Essentially plaintiff's position is that the court's ruling on August 28 amounted to the final judicial act which became effective as the judgment when noted in the judgment docket by the clerk, with the result that defendants' cost bills were filed out of time and should have been disallowed in their entirety. In support of its argument, plaintiff relies principally upon *Edwards v. Doctors Hosp., Inc.*, 242 F.2d 888 (2d Cir. 1957), *cert. denied*, 356 U.S. 930 (1958). There the question was, when did the time for appeal commence. It appeared from the opinion that the trial judge had directed a verdict and ordered the suit dismissed. The clerk immediately made a docket entry to that effect, two weeks

later the judge signed a formal judgment. Concluding that the judge's determination, followed by the docket entry, decided the case with finality, the Second Circuit held a notice of appeal filed more than thirty days afterward came too late. But such a conclusion is impermissible in this case. Here, the district judge did not order the suit dismissed, nor direct the clerk to enter judgment for defendants. Indeed that order would have been premature; since plaintiffs still were entitled to, and thereupon did, make a record upon the issue of damages. That the case was regarded by the judge as still open is clear; for he stated in the course of his ruling that he proposed to render a written opinion subsequently. "Under such circumstances it should be permissible to look at what the judge and clerk did later. And when we do so, we find that the record they made * * * shows unmistakable intent by the district judge to make a judgment [at a later time]." *Cedar Creek Oil & Gas Co. v. Fidelity Gas Co.*, 238 F.2d 208, 209 (3d Cir. 1956), cert. denied, 356 U.S. 932 (1958); *Accord, United States v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227, 235 (1958).

Moreover, local Rule 21 (now Rule 44) of the District Court requires that a judgment must be embodied in a written instrument signed by the judge before an entry of judgment can be validly made by the clerk. The rule specifically provides that "the entry in the docket of the judgment settled and signed by the judge will constitute the entry of judgment as provided by F.R.C.P. Rules 58 and 79a. Where written order of judgment is to be prepared by counsel and settled, no memorandum of decision or opinion or any minutes made by the Clerk of the Court's decision shall constitute entry of judgment under said Rules." The judge did sign a judgment on October 21 and, as the above extract from the docket shows, an entry to that effect was then made as contemplated by the Rules. It appears that the court was adhering to its rules and we conclude the bills were properly before the court.

(2) The court below, on plaintiff's motion followed by a hearing as provided by Fed. R. Civ. P. 54(d), retaxed some of the expenses claimed as costs by the defendants, but allowed defendants the expense of copies of pre-trial and trial transcripts, as well as copies of depositions.

Plaintiff does not make entirely clear the ground or grounds of objection to these allowances, but urges that they were "contrary to accepted practice" and for items secured "for the convenience of the parties or counsel." As we understand, plaintiff complains first that the court lacked power to tax these expenses as costs and second, granting power, the allowances constituted an abuse of discretion.

In the much cited case of *Stallo v. Wagner*, 245 Fed. 636 (2d Cir. 1917) the second circuit held that the expense of a trial transcript purchased by a party for his own use could not be taxed as costs. The court stated that no statute or rule in effect at that time expressly or by implication authorized the allowance. The only relevant statute was the Fee Bill of 1853, 10 Stat. 168 (1853), which provided that "fees * * * for * * * copies of papers necessarily obtained for use on trial" were taxable, and the only other pertinent provision on the books was Equity Rule 50, which authorized the court to appoint a stenographer to "take down testimony in shorthand and if required transcribe the same," his fee to be fixed by the court and taxed as costs. The court decided that the statutory phrase, "copies of papers necessarily obtained for use on trial," did not include a trial transcript obtained by a party and that the equity rule did not extend to any transcript save the original required by the court. Some courts, concluding that no changes have been made in this area since *Stallo* was decided, currently declare that expenses for copies cannot be taxed under any circumstances.[25] However, we think that material changes have been made in the rules and statutes which are sufficient to confer upon courts the power to tax such expenses.[26]

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[25]Typical is the statement in Department of Highways v. McWilliams Dredging Co., 10 F.R.D. 167 (W.D. La. 1950), *aff'd*, 187 F.2d 61 (5th Cir. 1951) that "there is no provision in the Federal Rules or statutes for the allowance to litigants of the costs of copies of transcripts of testimony which they see fit to purchase from the reporter, other than the original filed in the record." Accord, Kenyon v. Automatic Instrument Co., 10 F.R.D. 248 (W.D. Mich. 1950), affirmed, 186 F.2d 752 (6th Cir. 1951), *cert. denied*, 342 U.S. 820.

[26]Rule 80(a) of the Federal Rules of Civil Procedure superseded Equity Rule 50, discussed in the *Stallo* case. Both rules authorized the court to appoint a stenographer to transcribe and report the proceedings

Our conclusion is not new; in *Kemart Corp. v. Printing Arts Research Labs*, 232 F.2d 397 (9th Cir. 1956), we held an allowance of such fees was within the discretion of the trial court. And again in *A.B.C. Packard, Inc. v. General Motors Corp.*, 275 F.2d 63 (9th Cir. 1960) we reached the same conclusion upon an extended discussion.

We likewise conclude that the trial judge had the power to tax the expense of copies of the depositions. This question was exhaustively considered in *Perlman v. Feldmann*, 116 F. Supp. 102 (D. Conn. 1953). We agree with that case that the grant of such power is "implicit in 28 U.S.C.A. § 1920(2)." (*Id.* at 109; see also *Cooke v. Universal Pictures Co.*, 135 F. Supp. 480 (S.D. N.Y. 1955)), qualified only by the requirement of that statute that the various copies be "necessarily obtained for use in the case."[27] *Weiss v. Smith*, 103 F. Supp. 736 (D. Conn. 1952); *Bank of America v. Loew's Int'l. Corp.*, 163 F. Supp. 924 (S.D. N.Y. 1958).

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and, within its discretion, to tax his fee as costs; but while the earlier rule was construed to relate only to the original transcript, there was some judicial authority that Rule 80(a) applied also to the copy of a transcript obtained by a party. See 6 Moore, Federal Practice, ¶ 54.77[7], at 1372 (2d ed. 1953). Rule 80(a) was abrogated because of the intervention of the Court Reporter Act of 1944 (58 Stat. 5), which evidenced Congressional authorization for the allowance in the statements that the reporter might exact a fee "from parties * * * who request transcripts" and "any part or all of the fees for transcripts may be taxed as costs in the case." When the Court Reporter Act was carried over into the Judicial Code [28 U.S.C. § 753 (1958), as amended, 28 U.S.C. § 753 (Supp. IV, 1959-62)]: the last quoted statement was dropped. However, its substance now appears in section 1920(2) as follows: "A judge or clerk of any court of the United States may tax as costs the following: * * * (2) fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case * * *." 62 Stat. 955 (1948), 28 U.S.C. § 1920 (1958). See generally A.B.C. Packard, Inc. v. General Motors Corp., 275 F.2d 63 (9th Cir. 1960). We think that this language, like that of the Court Reporter Act, evidences an intent to enlarge the enumeration and to include within the items of cost the expenses of copies of transcripts of pre-trial as well as trial proceedings. See Perlman v. Feldmann, 116 F. Supp. 102 (D. Conn. 1953).

[27] See note 26 *supra*.

Here there is no doubt that the pre-trial and trial transcripts were reasonably necessary. This case was unusually involved and complex by any standard, even by those in the field of antitrust litigation. The complaint named ten defendants, who made up a veritable Burke's Peerage of the steel industry. It embraced the three claims mentioned earlier and concluded with a prayer for damages totaling nearly $14,500,000, plus attorneys' fees. Fifteen pre-trial hearings were held during the nearly four years in which the action was pending; they covered a multitude of matters, including advisory rulings by the court, discussion of issues and the trial agenda; they ranged from an hour or less to several days in duration. The trial itself, although prematurely brought to an end, extended over a period of approximately six weeks and occupied in excess of thirty full trial days. The need of counsel for a complete, accurate, and readily available record of all these proceedings, both those during and before the actual trial, is readily apparent even when the matter is viewed from this rather remote position. Taxation of the transcript expense was fully justified.

We do experience some uncertainty over the propriety of the district court's allowance of fees for copies of depositions. This is not due to the fact that the originals were all on file in the office of the clerk.[28] Rather, our difficulty arises from the fact that (a) none of the depositions taken by defendants, numbering fifteen in all, was introduced in evidence, and (b) defendants' need for copies of the fifty-seven taken by plaintiff is not made readily apparent.

(a) If the depositions were merely useful for discovery then they were not taxable items and their expense should have been borne by the party taking them, as incidental to normal prepara-

[28] True, some courts, including the one in which this case was tried, have on occasion declined to exercise their discretionary power to tax the expense of a copy, reasoning that where the original was on file it was readily available for counsel's inspection and thus the copy served principally as a convenience. Burnham Chemical Co. v. Borax Consol., Ltd., 7 F.R.D. 341 (N.D. Cal. 1947); Perlman v. Feldmann, supra. Here the vast number and size of the depositions—there were some seventy four running well over 15,000 pages in length—effectively rendered them unavailable for practical purposes and dictated the necessity for copies. See Ryan v. Arabian American Oil Co., 18 F.R.D. 206 (D.C. N.Y. 1955).

tion for trial. *Republic Mach. Tool Corp. v. Federal Cartridge Corp.*, 5 F.R.D. 388 (D. Minn. 1946). The record does show that the defendants used some of them for impeachment, and this would clearly qualify them for consideration. Had the issue of damages been actually tried, the remainder might have been similarly employed. Their allowance following a hearing constitutes an implied finding that the expense was properly taxable; a transcript of that hearing was not included in the record on appeal, and thus we have no basis to review the trial court's determination.

(b) Defendants' expenses for copies of depositions taken by plaintiff present a somewhat different problem. Many of the deponents were officers and employees of the defendants and were or might have been, available as witnesses at the trial. In *Hancock v. Albee*, 11 F.R.D. 139 (D. Conn. 1951) the expense of a copy of a party's own deposition taken by an adversary was allowed as costs. The court said the possibility that the deposition would be used to impeach the party created a reasonable necessity for his purchase of a copy in order to hold the impeachment within proper limits. The precise basis for the trial court's ruling in this case does not appear, and we cite *Hancock* to demonstrate that the same, or some other equally valid basis, may have existed to justify the court's allowance of these items.

No reversible error appearing, the judgment is affirmed.

(Endorsed) Opinion Filed July 16, 1963.

Frank H. Schmid, Clerk.

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Appendix "B"

In the United States District Court for the
Northern District of California,
Southern Division

Independent Iron Works, Inc., a corporation, Plaintiff, vs. United States Steel Corporation, Bethlehem Pacific Coast Steel Corporation, Bethlehem Steel Company, and Kaiser Steel Corporation, Defendants.	Civil No. 35,080

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OPINION

WOLLENBERG, District Judge.

This is a private antitrust action for treble damages. Plaintiff is a fabricator and erector of structural steel, located in Oakland, California. The

defendants, against whom the case proceeded to a jury trial (all other defendants having been dismissed) are United States Steel Corporation, the affiliated companies of Bethlehem Steel Company and Bethlehem Pacific Coast Steel Corporation, and Kaiser Steel Corporation.

The complaint, originally filed on November 28, 1955, and subsequently amended, alleges three causes of action. The first and second counts charge a conspiracy between the several defendants, under sections 1 and 2 of the Sherman Act, to restrain and monopolize or attempt to monopolize[1] trade in the sale of structural shapes and plates and in the fabrication of structural steel. The crux of plaintiff's claims is that it was unable to purchase from the several defendants all of the structural steel products it desired during the period in suit, i.e., January 1, 1955, to November 28, 1955. The third count is against United States Steel alone, charging a conspiracy with Southern Pacific Company (not named a defendant) to prevent free and competitive bidding on railroad car underframes, in violation of section 10 of the Clayton Act.

Numerous pretrial conferences were held during which the factual and legal issues were extensively explored. Each of the parties presented both orally and in detailed memoranda a full exposition of their respective positions. These proceedings eventuated in

[1] Plaintiff's alternative claims of *independent* monopolization and individual attempts to monopolize by each of the defendants find no support in the evidence.

the court's pretrial order of June 19, 1959, defining the issues and the scope of proof at trial.

Plaintiff, at the trial, first presented its evidence on the issues of violation of the antitrust laws. When plaintiff rested its case on liability, defendants severally moved to dismiss the first and second causes of action under Rule 41(b) and for directed verdicts under Rule 50(a) of the Federal Rules of Civil Procedure. United States Steel similarly moved with respect to the third cause of action.

In passing upon these motions, several preliminary observations are warranted.

This case involves only a fragment of the steel industry in the United States. It centers on structural shapes and plates sold by the defendants for use in the fabrication of structural steel in the seven Western States. The distribution of the total ingot tonnage of all types of steel produced by the several defendants is not relevant to this action. Such inquiries are not germane to the simple issue here of whether or not defendants conspired to limit supplies of *structural* steel sold to plaintiff in this competitive area.

Plaintiff bases its claim on acts of defendants in the year 1955 up to November 28th.[2] Plaintiff does not claim damages for acts of defendants prior to

[2]Plaintiff's cause of action, being founded upon an alleged continuing conspiracy and repeated refusals to sell, comes within the purview of the Ninth Circuit's decision in *Flintkote Company v. Lysfjord*, 246 F.2d 368 (9th Cir. 1957), certiorari denied (1957) 355 U.S. 835; accordingly, evidence of postcomplaint acts was inadmissible.

January 1, 1955, since plaintiff settled prior litigation and executed a release of all claims existing as of December 31, 1954.

At pretrial, plaintiff stipulated to confine its proof to certain designated jobs in the year 1955 but desired additionally and for background purposes to introduce evidence of certain pre-1955 jobs. Accordingly, for the limited purpose of attempting to establish the prior existence of the alleged conspiracy, the court permitted evidence pertaining to the 13th Street Freeway and Teaching Hospital jobs. Such pre-1955 evidence was not admitted against Kaiser. Plaintiff stipulated (Tr. 951-952) that "up to February 1, 1955, Kaiser Steel Corporation met the requirements of Independent Iron Works as Independent Iron Works called on them to do so, in quantity, in time, and also was a good, adequate and prompt supplier." The undisputed evidence respecting these two pre-1955 jobs contradicts, rather than supports, plaintiff's claim of conspiracy. Plaintiff's purchasing agent admitted that Bethlehem "offered quite a considerable tonnage of plate" when he needed it; indeed, Bethlehem offered plaintiff a larger tonnage than plaintiff chose to accept. Additionally, Bethlehem's delivery performance with respect to the 13th Street Freeway job was better than that of Kaiser, who plaintiff stipulated met plaintiff's requirements in quantity and on time. These undisputed facts leave no room for any inference of a conspiracy to withhold steel from plaintiff.

The U. C. Teaching Hospital job was fabricated by the Moore Dry Dock Company, who received the job

at the inception of the Korean War in 1950. Mr. J. R. Moore, vice president of that company, called as a witness by plaintiff, testified that wartime demands for steel, Government controls, and his inability to obtain priorities for this job affected Bethlehem's[3] ability to fill Moore's orders. Mr. Moore further testified that in the face of these problems "Bethlehem nevertheless made a definite effort to try to help out Moore Dry Dock Company in supplying steel for it for the U. C. Hospital job." This is demonstrated by the fact that during the years when Moore was fabricating the job it received about three times the tonnage of steel it had bought from Bethlehem in prior years. Here again these undisputed facts repudiated any reasonable suggestion of a conspiracy to withhold steel.

Turning then to 1955, plaintiff relies exclusively upon the defendants' alleged similar conduct as the basis for drawing an inference of conspiracy.

On these motions plaintiff is entitled to and must receive the benefit of all favorable inferences which can be drawn from the evidence. The plaintiff, however, still has the burden of establishing a prima facie case. He must rely upon reasonable and logical inferences from the evidence in the record. Plaintiff can not go to the jury on the basis of speculation, surmise or conjecture. *Wolfe v. National Lead Company*, 225 F.2d 427, 433-434 (9th Cir. 1955).

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[3]Notably the evidence with respect to this job is silent as to U. S. Steel and plaintiff stipulated that pre-1955 evidence was not offered against Kaiser.

In following these principles in the instant case, the court's way has been made easier by the remarkable absence of any real conflicts in the evidence. Despite the size of the record, the basic facts are not in dispute.

In deciding whether evidence of defendants' conduct can reasonably support an inference of conspiracy, there must be more than mere general similarities; there must be a sameness of conduct under circumstances which logically suggest joint agreement, as distinguished from individual action. Proof of parallel business conduct is not a substitute for proof of conspiracy, and similar conduct, as such, does not establish conspiracy. *Theatre Enterprises, Inc. v. Paramount*, 346 U.S. 537 (1954). As stated in *United States v. Borden Co.*, 111 F. Supp. 562, 579 (N.D. Ill. 1953): "Reasonable businessmen will act similarly when presented with the same problem." The antitrust laws were not meant to prohibit businessmen from adopting sound business policies merely because competitors had already adopted the same or a similar policy.

An inference of conspiracy is permissible only where the conduct was adopted by a competitor "in apparent contradiction to its own self-interest." *Milgram v. Loew's, Inc.*, 192 F.2d 579, 583 (3rd Cir. 1951). An inference of conspiracy would only arise from similar business conduct if it appeared more to the interest of competitors to adopt different practices. *Chorak v. RKO Radio Pictures*, 196 F.2d 225, 229 (9th Cir. 1952), certiorari denied (1952) 344 U.S. 887.

These are the general standards against which can be measured plaintiff's factual contentions in this case, recognizing always, however, that plaintiff is entitled to the benefit of all reasonable inferences which may be drawn from the evidence in this record.

Plaintiff first contends that the nationwide shortage of steel which commenced in the middle of 1955 was "artificially" created by the defendants. The undisputed facts, however, are to the contrary. The demand for structural steel products increased tremendously in the second quarter of 1955. The demand quickly outstripped the available supply. The customers' orders greatly exceeded the defendants' productive capacity.

Published and uncontradicted statistics show that the bookings of fabricated structural steel rose from 3,161,611 tons in 1954 to 4,651,312 tons in 1955, an all-time record. On the production side, similar published and uncontroverted statistics demonstrate that the steel industry was operating at close to 100% of capacity throughout most of 1955. During the shortage defendants were engaged in maximum production efforts.

Such uncontradicted evidence leaves plaintiff's theory of "artificial" shortage without support. "* * * one must always measure what is claimed by plaintiff to have theoretically happened against what is mathematically proved by defendants to have actually happened." *United States v. Natl. Malleable & Steel Castings Co.*, CCH Trade Cases, par. 68,890 (N.D. Ohio 1957), aff'd per curiam 358 U.S. 38 (1958).

Plaintiff next seeks to support its claims by the fact that each of the defendants is vertically integrated. That is, each defendant not only manufactures structural shapes and plates but also operates fabricating shops which use those products in competition with the plaintiff and other fabricators. United States Steel and Bethlehem have had such fabricating facilities for many years; Kaiser acquired its facilities in 1953. There is no evidence in the record that any defendant acquired any facilities pursuant to understanding or agreement with any other defendant. The mere fact that each defendant is vertically integrated does not support an inference of conspiracy. Vertical integration is clearly legal. *United States v. Columbia Steel Co.*, 334 U.S. 495, 525-526 (1948).

Plaintiff further argues, however, that each defendant supplied disproportionately large quantities of steel to its own fabricating shops. Even if true, this alleged favoritism of defendants' own fabricating shops would suggest normal, rather than conspiratorial conduct. In *Dipson Theatres v. Buffalo Theatres*, 190 F.2d 951, 960, 961 (2nd Cir. 1951), cert. den. 342 U.S. 926 (1952), the court in commenting on the evidence that "it was the policy of each [defendant] to favor theatres in which they had an interest," said, "This was to be expected, and the *fact that they did so is no evidence that they conspired to do so jointly rather than doing so individually*"; they "could legally favor their own theatres" (emphasis added).

In any event, undisputed facts refute plaintiff's argument. Over the years the defendants' respective

shares of the national fabricating market have been declining. Moreover, during the shortage each defendant's fabricating shops were rationed in the same manner as other customers and faced the same problems of operating within their limited supplies.

The crux of plaintiff's claim is that during the shortage in 1955, each defendant refused to sell plaintiff all the steel it wanted to purchase. Plaintiff would draw an inference of conspiratorial refusals from allegedly "parallel conduct" in that each defendant, in rationing its available supply, gave some consideration to its customers' past purchases.

It is settled law, however, that each defendant, acting individually, was legally entitled to sell or not to sell to any customer or to sell him as much as he saw fit. *Times-Picayune v. United States*, 345 U.S. 594, 625 (1953).

"If a manufacturer may sell to whom he pleases, it is entirely logical that he may restrict his sales as to quantity, and sell to his customers such quantities as he may see fit." *Fosburgh v. California & Hawaiian Sugar Refining Co.*, 291 Fed. 29 (pp. 36-37) (9th Cir. 1923).

And "an allocation system alone, without further factors, is not inherently illegal as a method of distribution in times of scarce supply." *Banana Distributors v. United Fruit Company*, 162 F.Supp. 32, 42 (S.D.N.Y. 1958).

The *Banana* case recognizes the logic and good business sense of some method of rationing in a shortage

period. Any other approach, as the testimony here shows, would leave many customers with no steel at all. The broad similarity of business conduct, in the sense that each defendant considered as one factor of its distribution policy its respective customers' past purchases, is not the kind of "parallel conduct" which will support an inference of conspiracy. Past purchases afford a logical and reasonable guide for distribution during a shortage period. Wholly apart from this broad similarity, however, the evidence shows dissimilarities in the actual methods each defendant followed which militate against any suggestion of "parallelism."

United States Steel's method was more formalized and mathematical than the methods of the other defendants. The tonnages of steel which each customer could order from each of its mills—so-called "entry limits"—were calculated with reference to the customers' purchase in 1953, 1954 and the first six months of 1955. The customer was notified in advance as to what his tonnages would be for the following quarter. These entry limits were generally intended as the maximum amounts which a particular customer could purchase. Exceptions, however, were made—notably in plaintiff's case—where the customer received additional tonnages.

Bethlehem's method differed from the methods of the other defendants. It was unique in that it differed within the Bethlehem organization itself. In considering past purchases as one of the factors affecting sales during the shortage, the top sales management

reviewed sales records over a number of years in making broad decisions covering all types of steel products; at the next level the product manager for plates looked exclusively to 1954, whereas the product manager for structural shapes started out using 1954 but later on took into account 1952 and 1953 as well as 1954; Mr. Cort, in charge of sales on the West Coast, was not bound by any of these recommendations but made his own determinations. In the case of plates he followed the product manager's recommendation and used 1954; in the case of structural shapes he considered customers' purchases in 1953 and 1954, to the end of providing each customer with the largest tonnage he had bought in either of those years. In all instances Bethlehem's consideration of a customer's prior purchases was intended to provide a minimum of monthly tonnage.

The tonnages which Kaiser provided its customers were for the most part worked out by direct negotiation with the customer. To the extent it gave consideration to past purchases, it looked to the year 1954. Kaiser, unlike the other defendants, frequently gave so-called "job protection," i.e., an assurance to furnish all of a particular type of steel needed by a customer for a specific job.

Other differences in the defendants' respective distribution methods are undisputed in the record. The foregoing examples are sufficient to illustrate that as soon as generalities are put aside, the many divergencies in the defendants' practices show such a lack of "parallel conduct" as to negate any inference of

agreement. Indeed, plaintiff's own purchasing agent testified, "that 1955 was a very confusing year insofar as allocations, and *various mills operated differently*" (emphasis added).

Plaintiff repeatedly urges that its total receipts of steel were lower in 1955 than in 1954. Yet the undisputed testimony shows that when steel was in ample supply at the end of 1954 and during the first part of 1955, plaintiff placed very few orders. Accordingly, its receipts were low in the first half of 1955.

In this regard the admissions made by plaintiff's purchasing agent while under cross-examination also are illustrative. Job by job, order by order, and shipment by shipment the witness admitted, on cross-examination, that Bethlehem had accepted all orders tendered by plaintiff for steel, had filled all such orders, and that Bethlehem's performance was satisfactory. Similar, though less detailed, admissions were made regarding the performances of United States Steel and Kaiser. Thus, plaintiff's own evidence flatly refutes the existence of any conspiracy to withhold steel from plaintiff.

In much the same vein is the evidence regarding the claimed lateness of deliveries. The defendants admit that there were some minor delays in the shipments of plaintiff's orders. The evidence explaining the causes of such delays is not disputed. Steel strikes, shipping strikes, and other unavoidable circumstances such as an unprecedented flood at the Bethlehem mill and interferences in production due to efforts to expand capacity reasonably account for the delays that oc-

curred. Indeed, in the light of such circumstances, the extent of the delays appears minimal. For example, the admissions of plaintiff's purchasing agent show that only 4% of Bethlehem's shipments were late and these were justifiably explained by the circumstances previously mentioned.

Two further matters in connection with the first and second causes of action warrant mention.

Plaintiff also contends that the defendants conspired to take fabricating jobs away from the plaintiff by reducing the prices they quoted to general contractors after the bidding. Out of 835 jobs which plaintiff bid on in 1955, it offered evidence of only two alleged instances of such bidding practices. In one case Kaiser had been unable to get its quotation to the successful general contractor prior to the opening of the bids. The contractor rejected Kaiser's offer and awarded the job to plaintiff. In the second case Bethlehem had bid a job to a contractor in two parts and after the bidding had inquired of the contractor whether Bethlehem's bid on the steel portion of the job was not low. Here again the contractor chose to accept the combined bid of plaintiff.

There was no evidence that any defendant ever reduced its price after the bidding, nor any evidence of any concerted action between the defendants regarding bidding. Finally, plaintiff's president testified that "under normal conditions" and "in fair competition" plaintiff would normally expect to get about 10% of the work on which it bid. In 1955 plaintiff bid on 174,041 tons of fabricated work and

actually obtained contracts for 19,733 tons—or better than the 10% it expected.

Plaintiff's complaint also charges a price-fixing conspiracy. However, plaintiff has never contended that the prices it paid for steel were higher than reasonable or competitive prices nor is there any evidence from which a reasonable inference of price agreement could be drawn.

Steel is a standardized product. The law is clear that even where there is proof of price uniformity in the sale of a standardized commodity, with or without price leadership, that is not sufficient to make a prima facie showing of agreement to fix prices. *United States v. Int. Harvester Co.*, 274 U.S. 693 (1927).

Furthermore, the testimony of plaintiff's own purchasing agent showed, not uniformity, but differences in the actual prices of steel. Indeed, the actual differences in mill prices, together with freight costs, are of such a substantial nature as to be determinative of the mill from which plaintiff will buy.

As to the remaining charges in the first and second causes of action of the complaint, plaintiff either offered no evidence at all or the charges were so patently unsupported as not to warrant discussion herein. In reviewing separately the evidence relating to each of plaintiff's contentions, the court has not overlooked giving consideration to them in their entirety. The record as a whole has been reviewed and whether plaintiff's charges are taken singly or collectively, the conclusion is inescapable that no logical or reasonable

inference of conspiracy between the defendants could be drawn.

It remains to consider briefly the third cause of action against United States Steel Corporation alone. This involves the narrow issue whether that defendant violated section 10 of the Clayton Act in connection with the bidding on certain freight car underframe jobs for the Southern Pacific Company. Considerable evidence was offered and received at the trial solely with respect to this third cause of action.

Section 10 of the Clayton Act requires a common carrier engaged in interstate commerce to hold competitive bidding when purchasing goods or supplies from any concern which has on its board of directors a person who is also a director of the common carrier. It is undisputed that during the period herein involved, Mr. James B. Black was a director of both defendant United States Steel and the Southern Pacific Company.

Preliminarily, United States Steel disputes whether an alleged violation of section 10 of the Clayton Act may be the subject of a private treble damage action. In this case the court need not pass upon that issue, for it is of the opinion that the record in any event fails to show a violation of section 10.

The evidence relates to the acts and conduct of Southern Pacific and United States Steel in connection with a number of bids for car frames between September, 1953, and October, 1955. The uncontradicted testimony of Mr. M. C. Nystrom, general pur-

chasing agent of Southern Pacific, was that Southern Pacific scrupulously followed the provisions of section 10 of the Clayton Act and the applicable regulations of the Interstate Commerce Commission relating to competitive bidding.

There is no evidence of any conduct by defendant United States Steel calculated to influence the award of the jobs involved other than the mere submission of its bids in compliance with the applicable statutory requirements. The fact that Southern Pacific accepted United States Steel's bids on certain jobs, although such bids were not in dollar amount the lowest of the bids submitted, will not support any inference of conspiracy between United States Steel and Southern Pacific or of any wrongdoing by United States Steel. Section 10 of the Clayton Act requires the carrier to accept the "most favorable" rather than the lowest bid, and the uncontradicted testimony of Mr. Nystrom was that the bid of United States Steel in each instance where it was accepted was, under all the circumstances, the most favorable to Southern Pacific.

In essence, plaintiff's legal contention is that section 10 should be so construed as to require a supplier which has a common director with a carrier to sell steel or other material to any and all persons who wish to compete against such supplier in bidding to the carrier. There is nothing in the statute, its legislative history or the regulations of the Interstate Commerce Commission to support such an interpretation of the statute.

The motions of the defendants are granted and the clerk is hereby directed to enter verdict and judgment in favor of each of the defendants, United States Steel Corporation, Bethlehem Pacific Coast Steel Corporation, Bethlehem Steel Company, and Kaiser Steel Corporation on both the first and second causes of action herein, and in favor of defendant United States Steel Corporation on the third cause of action herein, together with their costs.

Dated: Sept. 30, 1959.

ALBERT C. WOLLENBERG
United States District Judge.

Appendix C

No. 16,731

United States Court of Appeals
for the Ninth Circuit

Independent Iron Works, Inc., a corporation,
Appellant,

vs.

United States Steel Corporation, Bethlehem Pacific Coast Steel Corporation, etc.,
Appellees.

Appeal from the United States District Court
for the Northern District of California
Southern Division

JUDGMENT

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this Cause be, and hereby is affirmed.

Filed and entered July 16, 1963.

Appendix "D"

This is a case brought by a private litigant for treble damages, as provided in § 4 of the Clayton Act, Title 15, U.S.C.A., § 15, which reads as follows:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee."

The complaint is in three counts charging violations of §§ 1 and 2 of the Sherman Act and § 10 of the Clayton Act. § 1 of the Sherman Act, omitting irrelevant provisions, reads as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal. . . ."

§ 2 of the Sherman Act reads:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a misdemeanor. . . ."

Another antitrust provision is § 10 of the Clayton Act (15 U.S.C.A. § 20):

"No common carrier engaged in commerce shall have any dealings in securities, supplies, or other articles of commerce, or shall make or have any contracts for construction or maintenance of any kind, to the amount of more than $50,000, in the aggregate, in any one year, with another corporation, firm, partnership, or association when the said common carrier shall have upon its board of directors or as its president, manager, or as its purchasing or selling officer, or agent in the particular transaction, any person who is at the same time a director, manager, or purchasing or selling officer of, or who has any substantial interest in, such other corporation, firm, partnership, or association, unless and except such purchases shall be made from, or such dealings shall be with, the bidder whose bid is the most favorable to such common carrier, to be ascertained by competitive bidding under regulations to be prescribed by rule or otherwise by the Interstate Commerce Commission. No bid shall be received unless the name and address of the bidder or the names and addresses of the officers, directors, and general managers thereof, if the bidder be a corporation, or of the members, if it be a partnership or firm, be given with the bid.

"*Any person who shall, directly or indirectly, do or attempt to do anything to prevent anyone from bidding, or shall do any act to prevent free and fair competition among the bidders or those desiring to bid, shall be punished as prescribed in this section in the case of an officer or director.*" (Emphasis added.)

Office-Supreme Court, U.S.
FILED
OCT 7 1963
JOHN F. DAVIS, CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1963

No. 446

INDEPENDENT IRON WORKS, INC., a corporation,

Petitioner,

vs.

UNITED STATES STEEL CORPORATION, BETHLEHEM PACIFIC COAST STEEL CORP., BETHLEHEM STEEL CO., KAISER STEEL CORP.,

Respondents.

BRIEF OF RESPONDENTS BETHLEHEM PACIFIC COAST STEEL CORPORATION AND BETHLEHEM STEEL COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In the Supreme Court
OF THE
United States

October Term, 1963

No. 446

Independent Iron Works, Inc., a corporation,
Petitioner,

vs.

United States Steel Corporation; Bethlehem Pacific Coast Steel Corp.; Bethlehem Steel Co., Kaiser Steel Corp.,
Respondents.

BRIEF OF RESPONDENTS BETHLEHEM PACIFIC COAST STEEL CORPORATION AND BETHLEHEM STEEL COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (R. 4158-4191) is reported in ..... F.2d ..... The opinion of the district court (R. 780-796) is reported in 177 F.Supp. 743.

QUESTIONS PRESENTED

The questions stated by petitioner (Pet., pp. 2-5) are inaccurate and argumentative statements based upon erroneous representations of the record.

The true questions presented as to Bethlehem[1] are:

1. Did the district court and the court of appeals correctly hold that petitioner's evidence failed to show any facts which would support a conclusion or inference of Sherman Act violation?

2. Where petitioner charged limitation of structural steel sold to it during a specified period when demand outran supply, did the district court in its discretion properly, as the court of appeals held, admit evidence of representative transactions outside the period and exclude other cumulative evidence?

PRELIMINARY STATEMENT

Petitioner brought this suit under the Sherman Act for treble damages.[2] At the close of petitioner's evidence on liability, the district court granted respondents' mo-

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[1]Respondents Bethlehem Pacific Coast Steel Corporation and Bethlehem Steel Company were wholly owned subsidiaries of Bethlehem Steel Corporation (not a defendant). Unless the context otherwise requires, the affiliated companies will be referred to as "Bethlehem."

[2]The Sherman Act claims against all respondents are set forth in counts 1 and 2 of petitioner's complaint. The third count thereof, based upon section 10 of the Clayton Act, is directed against United States Steel Corporation alone. The matters covered by petitioner under the caption "Southern Pacific Car Undertrame Bids" and the first section of argument in its petition for certiorari (Pet., pp. 6-11, 17-22) concern United States Steel Corporation and do not relate in any way to Bethlehem.

tions for directed verdict and entered judgment of dismissal on the merits (R. 796, 840). The court of appeals affirmed, with an opinion which reveals meticulous review of the record.

The rulings of the courts below turn upon the particular facts and evidence in this case and are clearly correct. They are not in conflict with any other decision, and are entirely consistent with the decisions of this Court cited by petitioner (Pet. pp. 16-17).

No legal principle is at issue; the petition involves only application of established rules of law to the circumstances of this individual case. The petition does not involve any novel question or any question of general importance. The case is the common one of failure of proof.

STATEMENT OF THE CASE

This case arises out of the nationwide steel shortage that existed in the latter part of 1955. Petitioner complains that Bethlehem and the other respondents did not furnish petitioner all the steel it wanted during the shortage.

Petitioner was a structural steel fabricator with a plant located in Oakland, California. Structural fabricating was and is highly competitive, with numerous fabricators in the San Francisco Bay Area alone (R. 2401-2404).

The principal steel products used by structural fabricators are structural shapes and plates. Structural shapes

wide flange beams (H-shaped products best known for their use in multistory buildings).

Respondents are steel producers, and are also engaged in structural fabricating. Bethlehem has been in the structural fabricating business for more than 40 years, and has competed on the West Coast for about 30 years (R. 2401). Bethlehem uses steel it produces in its own fabricating operations, but it sells the major share of its structural steel production to trade customers, including fabricators such as plaintiff (R. 4023). It needs the good will of trade fabricators for its own business success.

Demand for structural steel has fluctuated widely in the years since World War II, depending largely on the activity of the construction industry. Structural demand outran the productive ability of the mills during several periods, despite continuous growth in mill capacity (R. 2529-2533).

Steel mill operations were at only 71 per cent of capacity in 1954 (R. 4012). But in 1955 the structural fabricating industry booked over 4,650,000 tons of new work, a record tonnage (R. 4010-4011). After months of not having enough orders, Bethlehem was deluged with orders for structural steel beginning in the second quarter of 1955. By the fourth quarter, the industry was operating at over 98 per cent of capacity, while Bethlehem's own mills exceeded 100 per cent of rated capacity (R. 4012-4014).

Faced with a record demand, Bethlehem (like other steel producers) could not immediately accept all orders tendered. Each producer had to adopt some method to

distribute its structural steel production equitably among its customers but, as petitioner's own purchasing agent conceded, the various mills used different methods of allocating or rationing steel (R. 1419).

Petitioner tried to beat the shortage by placing large duplicate orders with Bethlehem and other suppliers (R. 1545). Bethlehem accepted orders for tonnages of structural steel at a rate exceeding that of petitioner's purchases from Bethlehem in past years. Not satisfied with its total supplies, however, petitioner filed this suit on November 28, 1955, claiming damages for the period from January 1, 1955 to the date of complaint. The court denied petitioner's motion for a preliminary injunction to compel respondents to furnish all the steel petitioner wanted (R. 288, 3876).

After a month-long trial, petitioner rested its case upon a record that included the testimony of 41 witnesses, 122 exhibits offered by petitioner and 71 exhibits offered by respondents on cross-examination (R. 3526-3528, 3943-3946). Respondents moved to dismiss and for directed verdicts.

The trial court issued a written opinion reviewing the evidence and granting the motions (Pet. Appx. B). The court of appeals has exhaustively reviewed the record and affirmed the dismissal of the action.

ARGUMENT

I. NO RULE OF LAW IS IN ISSUE; THE UNDISPUTED FACTS PRESENT NO JURY QUESTION: THE PETITION INVOLVES ONLY ESTABLISHED LEGAL PRINCIPLES AND THE EVIDENCE IN THIS PARTICULAR CASE.

The petition seeks no more than a third review of the application of settled principles to undisputed facts. Lack of foundation for any reasonable inference of antitrust violation is apparent from evidence which was without conflict.[3]

Rulings of the courts below are correct and in accord with other decisions. The petition does not raise any question that is new or important, and indeed does not put any legal principle at issue.

There is only the common failure of a plaintiff's proof to sustain its charges in a particular case.

II. THE COURTS BELOW CORRECTLY VIEWED THE EVIDENCE AS A WHOLE AND IN THE LIGHT MOST FAVORABLE TO PETITIONER.

In an effort to raise a legal issue, petitioner asserts (Pet., pp. 2-3, 16-17) that the courts below failed to apply established principles of inference recently reviewed by this Court in *Continental Ore Co. v. Union Carbide & Carbon Corp.* (1962) 370 U.S. 690. This assertion is spurious. It is perfectly clear that the courts below viewed the evidence as a whole and in the light most favorable to petitioner.

---

[3]The trial court noted in its opinion (R. 784):

"* * * the court's way has been made easier by the remarkable absence of any real conflicts in the evidence. Despite the size of the record, the basic facts are not in dispute."

The district court stated (Pet. Apps. B, p. vi):

> "On these motions plaintiff is entitled to and must receive the benefit of all favorable inferences which can be drawn from the evidence."

And further (pp. xv-xvi):

> "In reviewing separately the evidence relating to each of plaintiff's contentions, *the court has not overlooked giving consideration to them in their entirety.* The record as a whole has been reviewed and whether plaintiff's charges are taken singly or collectively, the conclusion is inescapable that no logical or reasonable inference of conspiracy between the defendants could be drawn" (emphasis ours).

The court of appeals stated (Opn., p. 5):

> "After a painstaking review of the voluminous record, consisting of over 4,000 pages of testimony and several hundred exhibits, we are fully satisfied and firmly convinced that plaintiff's entire case comes within the rule approved by the Supreme Court, that 'it is the duty of the judge to direct a verdict in favor of one of the parties when the testimony and all the inferences which the jury could justifiably draw therefrom would be insufficient to support a different finding' [citing authority].
>
> Parenthetically we deem it appropriate at this point to observe that, although we have set out and discussed seriatim the various business practices which plaintiff contends the defendants commonly followed, *nevertheless we have, in fact, considered them collectively* and our conclusion reflects a faithful adherence to the recent admonition of the Supreme Court that 'in cases such as this, plaintiffs should be given the full benefit of their proof without fragile compartmental-

izing the various factual components and wiping the slate clean after scrutiny of each.' Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699 (1962)" (emphasis ours).

III. THE DECISION BELOW CORRECTLY AFFIRMED DISMISSAL OF THE ACTION: THE UNDISPUTED FACTS VIEWED IN THE LIGHT OF APPLICABLE LEGAL PRINCIPLES NEGATE ANY REASONABLE INFERENCE OF ANTITRUST VIOLATION.

A. Alleged conspiracy among respondents.

Petitioner argues six factors on which its claim of conspiracy is based (Pet., pp. 11-16). Without exception, its charges vanish before the facts proved. The evidence, considered item by item or as a whole, shows only ordinary, competitive business action and intent, and provides no basis for any conspiratorial inference.

Undisputed facts positively *disprove* the alleged denial or delay of steel supply by Bethlehem. Petitioner's own proof shows Bethlehem accepted and filled petitioner's orders on the jobs in issue, and made steel available on a basis which went beyond petitioner's past purchases from Bethlehem. The few references to Bethlehem in the petition reflect the complete failure of the evidence as a whole to support any inference of wrongful conduct.

1. Steel allocation in the 1955 shortage period.

The petition is notably silent on the undisputed record demand for structural steel which developed about the middle of 1955 (R. 3055-3060, 4010-4013). It was the admitted shortage conditions which impelled the distribution practices of respondents.

The producers, including Bethlehem, each adopted some method of dividing steel among its customers. Far from evidence of conspiracy, this was the normal, businesslike reaction to the pressures of excessive demand.[4]

Beyond that generality, there was little similarity of detail between the methods of Bethlehem and other respondents. Reviewing and contrasting their several methods, the court of appeals concluded (Op., pp. 6-7):

> "Clearly each defendant was fully justified, if not actually impelled, to take some affirmative steps in its own behalf to preserve so far as possible the continued good will of customers. Moreover, there was very little similarity of detail in the way each defendant divided production. * * * These methods do not evidence similarity; their variety strongly suggests individual action."

2. Vertical integration.

Though conceding that "vertical integration per se might not be illegal", petitioner argues it is somehow suspect (Pet., p. 12). Vertical integration is commonplace throughout American business and is indisputably legal (*U.S. v. Columbia Steel Co.* (1948) 334 U.S. 495, 525). Bethlehem has engaged in fabrication as well as production of steel for some 40 years (R. 2401).

3. Treatment of trade customers and own fabricating shops.

The cornerstone of petitioner's case was the charge that respondents had conspiratorially withheld steel from

[4] As the trial court stated in its opinion (Pet. Appx. B, p. 61): "The antitrust laws were not meant to prohibit businessmen from adopting sound business policies merely because competitors had already adopted the same or a similar policy."

petitioner. Proof of Bethlehem's actual handling of petitioner's orders totally destroyed the case against Bethlehem. Bethlehem's trial counsel reviewed with petitioner's purchasing agent on cross-examination every purchase order of petitioner for steel from Bethlehem on the stipulated jobs (on which petitioner specifically relied for proof of its charges), every delivery promise of Bethlehem in response to such orders, and all the shipping notices which accounted for delivery of every pound of ordered steel for the jobs up through the date of the complaint (R. 2025-2130).

The undisputed facts—the detailed testimony elicited from petitioner's own purchasing agent—were that Bethlehem accepted *every* such order for steel tendered by petitioner for use on the jobs in issue, and that it filled *every* such order on time except for minor delays on a small amount of tonnage (R. 2025-2130).

The impact of such testimony is reflected in the fact that the petition nowhere claims that Bethlehem refused specific orders for steel or delayed shipments on particular jobs. Recognizing its failure to prove its claim, petitioner seeks refuge in a general comparison of amounts of steel Bethlehem shipped to petitioner in 1954 and 1955 (Pet., p. 14). Petitioner's fallacious comparison fails to reveal the undisputed fact that the reduction in total Bethlehem shipments to petitioner in 1955 was due, first, to lack of orders by petitioner in the first half of the year when steel was freely available (R. 1367, 1964-1965, 1980-1984); and, second, to the fact that Bethlehem could not fill all orders in the latter part of 1955 at precisely the times petitioner requested because of the record demand.

complicated by production interferences due to mill expansion programs, strikes and other delaying factors beyond Bethlehem's control (R. 2131, 3055-3064, 4010-4013).

Further, despite demand and production conditions, Bethlehem made 400 tons a month of eastern structural shapes available to petitioner at the height of the 1955 shortage, though in no prior year had petitioner purchased as much as 4,800 tons of such shapes (R. 2106-2109, 4018-4019). This increased rate of supply disposed of petitioner's claim of "arbitrary historical allocations" limited by past purchases.

Petitioner next charges that, while steel was rationed to other fabricators, the fabricating shops of respondents got unlimited amounts of steel (Pet., pp. 13-14). No evidence supported this charge; the proof was to the contrary. The evidence was uncontroverted that each respondent limited the amount of steel it supplied to its shops on the same general basis as steel it sold to other customers (R. 1579-1582, 2507, 2716, 3239, 3292-3294, 3308, 3316). The court of appeals concisely stated (Op., p. 9):

> "* * * we need not consider that question [the right of a supplier to favor its own subsidiary] because no favoritism is apparent from the record. Defendants' plants were placed under restrictions equivalent to those imposed on the plaintiff."

Not only did Bethlehem's shops receive steel on the same basis as all other customers (R. 3239, 3316), its shops received less tonnage of wide flange shapes in 1955 than in any year since 1947 save one (R. 3168, 4023). The trend in shipments as between Bethlehem's own shops and trade customers has been strongly in favor of trade customers

(R. 3167-3169; 4023). In a fragment of argument, petitioner claims that Bethlehem shipped more structural shapes to its West Coast fabricating shops than to trade fabricators in the third quarter of 1955 (Pet., p. 13). The court below laid bare the misrepresentation of the record behind this assertion in footnote 12 of its opinion (Op., p. 11). This footnote is but an example of the painstaking examination of even minor facets of the record pursued by the court of appeals in affirming the dismissal.

f. Alleged price uniformity.

The petition refers to alleged "price uniformity" (Pet., p. 14), for no apparent reason except that everyone knows "price fixing" is an antitrust charge. Petitioner does not claim any damage from prices charged, uniform or not; it has never contended any Bethlehem price was unfair. This is a supply case, not a price case.

Moreover, the proof showed not price uniformity but price variation. The court of appeals tabulates the variations of a dollar a ton and more in footnote 13 (Op., pp. 12-13). Petitioner's purchasing agent testified that a difference of a dollar a ton on a standardized product like

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[5]Petitioner also asserts that Bethlehem made prompt delivery of steel to its own shops, but not to petitioner; and complains that Bethlehem had the "effrontery" to advertise that it fabricated and erected steel work "on time" (Pet., p. 14). As above noted, Bethlehem's performance on petitioner's orders was in fact remarkably good. It was undisputed that Bethlehem's own shops experienced delays as did other fabricators (R. 3253-3263, 3272-3274). To advertise one's reliability is as old as advertising itself. And advertisement of work "on time" no more than corroborated Bethlehem's practice of trying to quote delivery dates it could meet, in contrast to petitioner's admitted practice of bidding without regard for anticipated steel supply (R. 2419-2420).

steel was sufficient to determine petitioner's choice of supplier, and that "there is more of a variance in price than that" (R. 1999). This was why petitioner sought to buy certain products (such as wide flange shapes) from Bethlehem, and other products from other suppliers.[6]

5. Sales of steel between respondents.

Petitioner argues that respondents "traded off" steel (Pet., pp. 14-15). Bethlehem on occasion both sold to and purchased various products from United States Steel Corporation and Kaiser Steel Corporation and other suppliers. From the undisputed evidence it was apparent, as the court of appeals stated (Op., pp. 13-15):

> "By characterizing the sales and purchases of steel between defendants as 'trades' the plaintiff attempts to impart a conspiratorial significance to what were in fact—so far as this record shows—no more than ordinary business transactions. * * * What is apparent is that, if a defendant did not make a particular product or if because of a difference in freight charges, due to the location of the mill where the product was made, it was cheaper to buy from another producer, then the two dealt with each other, but on the same terms that were extended to all buyers."

The volume of such sales was minimal (R. 1622-1626, 2545, 3249, 3999-4004). Petitioner itself had "exchange accounts" with other local fabricators, and its purchasing agent admitted it was "common practice" for fabricators to make occasional sales to one another (R. 1920-1921).

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[6] In the same vein, petitioner concedes that Bethlehem was the principal supplier of wide flange beams on the West Coast, not for any conspiratorial reason, but because its mills are so located that "a favorable ocean freight rate is applicable" (Pet., p. 25).

6. **Alleged noncompetition of respondents in certain areas.**

Petitioner's last contention is plainly insubstantial. The argument is that an inference of conspiracy arises from the admitted facts that Bethlehem and Kaiser Steel Corporation do not have warehouses but United States Steel Corporation has, and that Bethlehem builds ships while United States Steel Corporation does not (Pet., p. 15). At the same time, petitioner argues that an inference of conspiracy also arises from the opposite fact that respondents all have competing fabricating shops (Pet., p. 12). These arguments destroy each other.

In sum, petitioner's alleged "factors from which the jury might have drawn an inference of conspiracy" were never more than accusations. The actual evidence showed normal business conduct, as the courts below found. By no stretch of reason did the undisputed facts permit any inference of conspiracy.

The proof of Bethlehem's performance in supplying steel to petitioner established that Bethlehem did *not* refuse to accept orders or delay deliveries as petitioner charged (R. 2025-2130). The facts swept away the charge.

B. Alleged individual attempt to monopolize.

Petitioner insists it relies upon alleged individual attempt to monopolize as well as alleged conspiracy to monopolize (Pet., p. 24). But conspiracy presupposes that respondents agreed to act jointly for their mutual benefit, while individual attempt to monopolize presupposes that each respondent sought market position in derogation of the other respondents. The failure of proof on the individ-

ual attempt charge was as absolute as on the inconsistent conspiracy charge.

Petitioner argues attempt to monopolize structural steel and structural fabricating, but there was no evidence to show the total market for structural steel or structural fabricating in the western states, or the market share of any respondent. The only evidence on the subject establishes that Bethlehem's share in structural fabricating has substantially *declined* over the years (R. 4023, 4077-4078).

In a more refined flight of fancy, petitioner argues that Bethlehem attempted to monopolize "the fabrication of multistory buildings" (Pet., p. 25). But the proof did not show even that Bethlehem fared better in securing such work than other fabricators. Actually, the "multistory building" jobs which were the principal subject of evidence at trial—the Tulare County Courthouse and the Union Oil Center—were successfully obtained by *petitioner* in competitive bidding against Bethlehem and other fabricators (R. 1716, 1810, 2692-2693).

Further, nothing in the record indicates that "multistory buildings" comprise a separate market differentiated from many other similar types of structural fabricating. The court of appeals correctly pointed out (Op., p. 16):

> "We are left to speculate whether there was a distinct economic market for this product, and, if so, the extent of that market."

C. Alleged conspiracy between the affiliated Bethlehem companies.

In another peripheral contention, petitioner argues a theory of intra-enterprise conspiracy between Bethlehem Steel Company and Bethlehem Pacific Coast Steel Corporation (Pet., pp. 35-37). Bethlehem Pacific Coast Steel Corporation, created for internal corporate reasons to handle the Bethlehem business on the Pacific Coast, existed from 1945 to 1959. During this period, Bethlehem Steel Company operated in the rest of the country (R. 3046-3048).

Here again, when it came to proof, petitioner had nothing to offer beyond the mere fact of separate corporate existence for a given period—a wholly legal and commonplace business practice susceptible of no invidious inference. The court of appeals dealt shortly with the point (Op., p. 11):

> "There is a measure of similarity evidenced in the policies these defendants adopted with respect to distribution of structural steel, and there is the additional fact that they were subsidiaries of a larger corporation and hence under common ownership; that is the most that can be said of the evidence tending to support plaintiff's claim. This falls short of the proof required to make out a prima facie case of conspiracy."

The propriety of such conduct of corporate operations is manifest in antitrust statutes and decisions. Section 7 of the Clayton Act, while condemning certain mergers and acquisitions, expressly provides for the ordinary conduct

of business operations through subsidiary corporations.[7] The rule of the cases is that the fact of corporate relationship will not insulate from liability a business enterprise otherwise violating the law (*United States v. Yellow Cab Co.* (1947) 332 U.S. 218; *United States v. Columbia Steel Co.* (1948) 334 U.S. 495, 522-523). No authority holds that business operations lawful when conducted through a single corporate entity become unlawful if conducted by affiliated corporate units of the same enterprise.[8]

IV. EXCLUSIONS OF EVIDENCE BY THE TRIAL COURT WERE PROPER; AND EVEN IF ADMITTED, SUCH EVIDENCE WOULD NOT HAVE CHANGED THE RESULT.

Petitioner presented testimony from 41 witnesses during a month of trial. The court admitted 193 exhibits (R. 3943-3946). The trial transcript comprised over 2,800 pages.

The chief issue is necessarily the failure of the mass of evidence admitted to support any reasonable inference of

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[7] "Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations."

[8] Petitioner's reliance (Pet., p. 37) on *Kiefer-Stewart Co. v. Seagram & Sons* (1951) 340 U.S. 211, *Schine Theatres v. United States* (1948) 334 U.S. 110, and *Sanib Corporation v. United Fruit Company* (S.D.N.Y. 1955) 135 F.Supp. 764, is misplaced. *Schine* and *Sanib* were monopolization cases where liability would have existed even had the business enterprise been a single corporation. In *Kiefer-Stewart*, instead of an organizational division of functions between the affiliated corporations, this Court pointed out that they "hold themselves out as competitors" (340 U.S. 215). No comparable circumstances exist here.

wrongdoing. Petitioner's further contention that some items of evidence were improperly excluded merits but brief notice.

Section 2111 of Title 28 of the United States Code establishes the principle that cases are not to be reversed where no substantial effect on the petitioner is demonstrated. Petitioner's threshold problem—and it is an insurmountable problem—is that the *admitted* evidence proved that petitioner had no case. Petitioner would need, in short, not only to locate additional evidence, but to eliminate proof it heretofore put in the record which contradicts its claims against Bethlehem.

Important apart from the wide-ranging evidence the court allowed is that the limitations on scope of proof were basically determined by the prior release executed by petitioner and by the date it elected to file suit; and were further determined by petitioner's cumulative job-by-job approach to the case and its voluntary concessions that limitations were necessary (R. 591, 860-861, 995, 1204-1209, 1220-1222, 1279).[9] Petitioner had previously brought other antitrust suits against United States Steel Corporation and Bethlehem, and had given a complete release as to all acts through December 31, 1954 (R. 182, 772-773). Pre-1955 evidence could thus only be for "atmosphere" or "background", and could not be the basis for any damage claim. With reference to evidence of

[9] The Judicial Conference of the United States in its authoritative Report on Procedure in Anti-Trust and Other Protracted Cases (1951) has stated (p. 25):

"Such evidence as is merely possibly helpful, or which merely supplies 'atmosphere' or 'background', may be rigidly excluded. * * * The matter is within the discretion of the trial judge."

acts after the date of the complaint herein, petitioner advised the trial court it intended to bring a separate suit, and stressed its desire that this action not involve, so as to be res judicata of, petitioner's damage claims for any subsequent period (R. 683-684).[19]

Five items of excluded evidence are mentioned by petitioner. The deposition of Dr. Kreps, an economist (Pet., pp. 27-31), and the two documents of the Civilian Production Administration dated in 1946 (Pet., pp. 38-41), are fully and correctly disposed of by the court of appeals (Op., pp. 21-24, 28). The remaining three items, referred to by petitioner as "Judson-Pacific Murphy Corp. Testimony", "Union Steel Company Testimony" and "Department of Employment Building Testimony" (Pet., pp. 41-43), were similarly urged by petitioner in the court below (Appellant's Opening Brief, pp. 116-121). The court of appeals viewed these items as "ones [not] having sufficient merit to warrant discussion" (Op., p. 28).

Such rulings were clearly justified and, to repeat, all of the excluded evidence could not have aided petitioner where the admitted evidence demonstrated that petitioner had no case.

[19]Petitioner's motion on the eve of trial for leave to file a supplemental complaint (Pet., p. 45) was, as the court of appeals held (Op., pp. 27-28), properly denied.

CONCLUSION

The decision of the court of appeals is clearly correct. It rests upon an appraisal of the facts and evidence in this record concurred in by both courts below. There is no conflict of decisions. The petition for a writ of certiorari should be denied.

Dated, San Francisco, California,
October 6, 1963.

Respectfully submitted,

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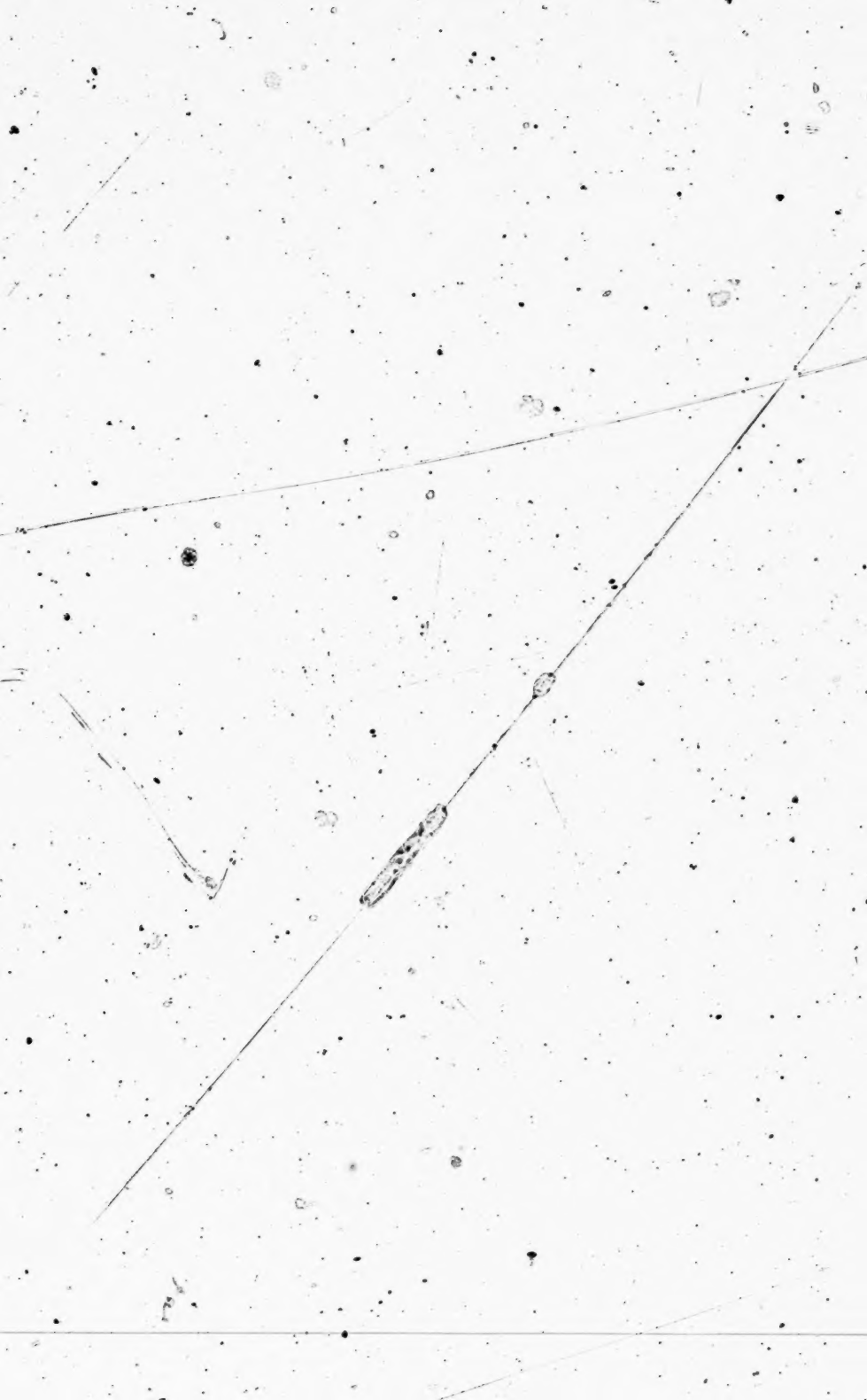

Office-Supreme Court, U.S.
FILED
OCT 14
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM 1963

No. 446

INDEPENDENT IRON WORKS, INC., a corporation,

Petitioner,

vs.

UNITED STATES STEEL CORPORATION, BETHLEHEM PACIFIC COAST STEEL CORPORATION, BETHLEHEM STEEL COMPANY, and KAISER STEEL CORPORATION,

Respondents.

Brief of Respondent Kaiser Steel Corporation In Opposition to Petition for a Writ of Certiorari

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Respondents.

Brief of Respondent Kaiser Steel Corporation In Opposition to Petition for a Writ of Certiorari

I.

QUESTIONS PRESENTED

1. Were the District Court and the Court of Appeals correct in holding that Petitioner failed to prove a *prima facie* case under Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2)?

2. Did the District Court commit prejudicial error in its rulings on certain evidentiary and procedural points raised by Petitioner?

II.

STATEMENT OF THE CASE

A. Petitioner's business.

The case is well summarized in the opinion of the Court of Appeals (Petition, App. A, pp. 2-10, 12-17), but a more detailed statement is here desirable directed toward the questions now presented in the Petition, including certain special facts relating to Respondent Kaiser Steel Corporation (hereinafter referred to as "Kaiser").

This case arose out of the steel shortage that existed throughout the United States in the latter part of 1955. Petitioner's chief complaint against Respondents is that each of them, allegedly acting in concert as conspirators, failed to furnish Petitioner during such shortage with all of the steel it wanted at the times desired.

Petitioner is a structural steel fabricator with a plant located in the city of Oakland, in the San Francisco Bay Area of Northern California. Petitioner began business in 1924 with an investment of $250 (R. 1351-1352, 2385) and, without additional capital investment, it had grown, by 1955, into a company with plant and equipment that its president estimated was worth $4,000,000 (R. 2487). As a structural fabricator, Petitioner fabricates and erects the structural steel framework for buildings, bridges, highway overpasses and other structures.

Although Respondents are primarily steel producers, each of them is also engaged in structural fabricating (R. 2673-2675). Respondent United States Steel Corporation (hereinafter referred to as "U. S. Steel") has been a structural fabricator as well as a steel producer since the company was organized in 1901, and has had structural fabricating plants on the West Coast since 1948, see *United States*

v. Columbia Steel Co., 334 U.S. 495 (1948). Respondent Bethlehem Steel Company (hereinafter referred to, along with Bethlehem Pacific Coast Steel Corporation, collectively, as "Bethlehem") has been in the structural fabricating business for approximately 45 years and has had plants on the West Coast for about 30 years (R. 2401). Kaiser commenced structural steel fabricating in February, 1955—*less than ten months before this suit was brought*—when it acquired fabricating facilities in the city of Montebello, south and east of Los Angeles, California (R. 1606).

Structural fabricating is a highly competitive business with numerous aggressive concerns seeking work. Over 18 independently owned companies compete with Petitioner in the San Francisco Bay Area alone (R. 2401-2404). The number of steel fabricators in California has more than doubled since 1939 and has increased over 60% since 1947 (Ex. U-32, R. 2715, 4078). Over the years, independent fabricating companies nationally have occupied an increasingly large share of the market (Ex. U-31; R. 2713, 4077).

The principal steel products used by Petitioner and other structural fabricators are structural shapes, plates and wide flange beams. Since World War II, Petitioner has bought most of its steel from the various Respondents, purchasing substantial quantities of wide flange from Bethlehem, and substantial quantities of plate and structural shapes, from U. S. Steel and Kaiser (Ex. F-2, R. 1952, 4056-4062). Petitioner, of course, seeks to buy from the cheapest source (R. 1999-2000).

Each Respondent sells most of its structural steel to trade customers, including fabricators such as Petitioner, but also furnishes structural steel to its own fabricating plants (R. 2533, 3999, Ex. B-68, R. 3167, 4023).

B. Kaiser's position in the steel industry and its product limitations.

Kaiser was a "war baby", blowing in its first blast furnace in December, 1942 (R. 1602, 1604-1605). Following the end of the war, it went through four expansion programs. In 1955 the annual capacity of its only mill, that at Fontana (approximately 60 miles east of Los Angeles), was 1,500,000 tons of steel ingots (R. 1602). While that figure may seem large, as Petitioner's counsel said in his opening statement, it resulted in Kaiser producing less than 2% of the national steel output, which he contrasted with 30% by U. S. Steel and 15% by Bethlehem (R. 1311-1312). Because Kaiser is a relatively new and small company, there are very substantial limitations on the nature and extent of Petitioner's possible proof against Kaiser.

Petitioner's case relates to but one of the many phases of the steel industry, namely, fabricated structural steel used by the construction industry. That phase involves no more than 10-15% of the total national steel output (R. 1311). Within that phase of the over-all steel industry, Petitioner's case focuses on the difficulty which it encountered in 1955 in obtaining sufficient quantities of particular products, namely, (1) wide flange beams, (2) large structural shapes rolled by the Eastern mills, particularly Z bars for railroad car underframes, and (3) plates.

(1) *Wide flange beams* have flanges running up to 36 inches in width, appear H-shaped in cross section, and are used for beams and columns in heavy structures such as large buildings and bridges (R. 1360). Special equipment is required to roll wide flange beams (*ibid.*). Petitioner asserts that "the mills in the western part of the United States cannot roll wide flange material. . . ." (Petition 6). Petitioner

concedes that Kaiser was "not much of a factor" in the wide flange market (R. 1312, 880), and identifies Bethlehem as the source of wide flange material on the West Coast (Petition 5-6), and Petitioner's normal supplier of such material (R. 1716). The reason why Kaiser's participation in the wide flange market was *de minimis* is simple: *having no wide flange mill*, it improvised by rolling, on its structural mill, a section which, although slightly different, qualified as wide flange. Kaiser was able to roll this special section in the small 8-10 inch sizes only (R. 2149, 1603). The construction of a wide flange mill on the West Coast is not economically feasible; even if one steel mill had the entire West Coast market for wide flange, that quantity would be insufficient for economical operation (R. 3132-3133). The small special sections which Kaiser produced covered a very minor percentage of the wide flange requirements of Petitioner (R. 2150). *This evidence eliminates Kaiser from the wide flange picture.*

(2) With respect to *Z bars*, a product discussed at great length in the Petition, *Kaiser drops out of the picture completely.* The reason is simple: Kaiser cannot produce Z bars for lack of the required equipment (R. 2149).

(3) *Plate* (flat rolled steel pieces differentiated from steel sheet by thickness) is the one product involved in this action which was produced by Kaiser to any significant extent. Even as to plate, Kaiser's mill limitations and product ranges imposed severe restrictions on its ability to meet Petitioner's needs. For example, Petitioner's Fourth and Main and Salinas River Bridge jobs together required 1,275 tons of plate (R. 1766, 1772), of which only a total of 180 tons fell within Kaiser's mill limits *and Kaiser accepted and furnished that tonnage* (R. 2176-2177).

C. Petitioner stipulated that it had no claims whatever against Kaiser prior to February 1, 1955 and did not offer its pre-1955 evidence against Kaiser for any purpose.

Kaiser did not enter the *structural steel fabricating business* until February 1, 1955, when it acquired the Montebello, California, plant of Union Steel Company, located south and east of Los Angeles (R. 1606).

From the beginning to the end of the case, Petitioner made it clear that its only claim against Kaiser related to 1955 (R. 860 (pretrial); R. 1202 (trial)). Petitioner's counsel stipulated that:

> ". . . up to February 1, 1955, Kaiser Steel Corporation met the requirements of Independent Iron Works as Independent Iron Works called on them to do so, in quantity, in time, and also *was a good, adequate and prompt supplier*" (R. 1957; the emphasis has been added throughout the Brief, unless otherwise indicated.)

Petitioner's counsel agreed that the jury should be instructed that Kaiser was not bound by pre-1955 evidence, and that it was not offered as to Kaiser in any way (R. 1888-1889). The court instructed the jury as follows:

> ". . . Ladies and gentlemen, counsel have stipulated; that is, Mr. Johnson and Mr. Hilldebrand—Mr. Johnson on behalf of the defendant Kaiser Steel Company—that Kaiser up to the year 1955 supplied steel upon order on all occasions at the request of Independent Iron Works, was a good supplier, and filled orders as they were filed satisfactorily in all ways, and that their complaint with Kaiser is subsequent to January 1, 1955." (R. 1958)

The stipulation and instruction were applied and confirmed in a number of specific instances during the trial (R.

1899, 1913-1914, 2429, 2810-2811), making clear beyond any question that no evidence of an alleged conspiracy existing prior to 1955 related in any way to Kaiser, and that Petitioner had no complaints of any kind against Kaiser prior to February 1, 1955.

D. The Montebello Fabricating Division of Kaiser was not a competitor of Petitioner during 1955.

The record shows that Kaiser's Montebello Fabricating plant bid against, or in competition with, Petitioner on *2 jobs out of the 835* jobs bid by Petitioner in 1955 (R. 2442). Furthermore, on those two jobs—the Salinas River Bridge job and the Union Oil Office Building jobs—*Petitioner* was the low bidder and was awarded the contracts. There was no substantial evidence of competition between Kaiser's Montebello Fabricating plant and that of Petitioner located over 425 miles away.

E. The structural steel shortage of 1955.

Demand for structural steel has fluctuated over the years, depending largely on the volume of work being done by the construction industry. Since World War II there have been several periods during which demand for steel outran the productive ability of the mills, despite the continuous growth in mill capacity (R. 2528-2533).

The steel shortage which led to the filing of this lawsuit developed in mid-1955. In 1954, steel mill operations dropped to 71% of capacity (Ex. B-52, R. 3060, 4012). In 1955 there was a record increase in bookings for fabricated structural steel work (Ex. B-50, R. 3054, 4010-4011), as another building boom got under way. In that year, the structural fabricating industry booked 4,651,312 tons of new work, an increase of 47% over 1954, and an all-time high tonnage (Ex. B-50, *supra*; Ex. B-51, R. 3058, 4011).

After months of not being able to get enough orders to operate their steel mills at capacity, each Respondent was met with a flood of orders for structural steel beginning in the second quarter of 1955. By the fourth quarter, the industry was operating at over 98% of capacity (Ex. B-52, *supra*; Ex. B-53, R. 3061, 4012-4013). Bethlehem's mills even exceeded 100% of the rated capacity in the last three months of the year (Ex. B-54, R. 3069, 4043; Ex. B-55, R. 3071, 4014).

The inevitable result of this sudden and overwhelming demand was that Respondents could not immediately accept all the orders that were tendered to them. Each Respondent had to adopt some method of dividing the steel it produced among its customers so that all would have a share, until such time as supply came into balance with demand. Respondents met this problem in varying ways. As Petitioner's purchasing agent testified (R. 1419):

> "Well, let me state at this time that 1955 was a very confusing year insofar as allocations, *and various mills operated differently.*"

Each Respondent continued to supply steel to its own structural fabricating facilities. But such fabricating facilities, just like trade customers, could not buy all the steel they wanted and had to restrict the amount of new business on which they bid (R. 2716, 3239, 3273, 3292-3294, 3299-3302, 3308).

Meanwhile, Petitioner bid on jobs without reference to industry supply-demand conditions (R. 2419, 2422-2424, 3399). Petitioner bid or quoted on 174,041 tons of work in 1955, of which it secured contracts for 19,733 tons (R. 2412, 2417)—a larger percentage of successful bids than Petitioner's

president testified he would normally expect to get (R. 2413). The 19,733 tons booked in 1955 was a record high for Petitioner (R. 2416-2417). The larger tonnage jobs were bid and secured by Petitioner in the latter part of 1955 (R. 1965-1966) after, and with the knowledge that, the steel shortage had become acute (R. 2145, 2169), apparently with the expectation that Petitioner's lawyers would get the steel (R. 2422).

By late 1955 Petitioner had a record backlog of work on its books and knew that there would be difficulty obtaining early delivery of steel except at the expense of some other fabricator. Petitioner thus had painted itself into a corner.

Petitioner presented a rash of duplicate orders to each Respondent for early delivery of large quantities of steel. Many of the orders were accepted as the various Respondents tried to accommodate Petitioner's requests. Other orders simply could not be filed for early delivery. In its eagerness to book more work, despite the increasing steel shortage, Petitioner in October 1955 bid and obtained a contract to manufacture underframes for Southern Pacific Company—*the largest contract on Petitioner's books*—(at 10% below Petitioner's estimated cost) (R. 3398-3399). Petitioner took the extraordinary step of resubmitting to all three Respondents *by registered mail* a number of orders calling for production and delivery dates on various jobs which it knew in advance were impossible of performance and would be rejected (R. 2009-2010, 2228-2229; e.g. Ex. 84, R. 1861, 3962-3963). Thereupon, on November 28, 1955, Petitioner filed the present action seeking damages and an injunction compelling Respondents to supply more steel (R. 40).

III.

NO ADEQUATE GROUNDS FOR GRANTING THE WRIT HAVE BEEN CLAIMED

The Petition is a repetition of arguments and contentions made by Petitioner during the eight years of this litigation. In only one section of the Petition (pp. 16-17) is even superficial recognition given to the fact that (Petitioner already having had a fair trial and an impartial and exhaustive review on appeal) some *reason or ground* must be shown, within the well-recognized limits of Rule 19 (Supreme Court of the United States Revised Rules, 28 U.S.C.A.), to justify the United States Supreme Court in exercising its discretionary powers in granting the writ of certiorari. The four reasons stated in the Petition lack substance.

The alleged first reason relates to Section 10 of the Clayton Act, the third cause of action of the amended complaint, and the carframes, none of which matters are considered in this Brief since they do not apply to Kaiser.

The second alleged reason is claimed prejudicial error in the District Court's ruling, during the discovery phase of the case, excluding the deposition of Dr. Kreps, a matter which will be discussed later in this brief (Section IV D (1)). Assuming, for purposes of argument, that the United States Supreme Court might have had an interest in the *general question* as to appropriate limits to be placed upon the admission of expert economic testimony in anti-trust cases, the Court of Appeals has resolved this general question *in Petitioner's favor*. The questions as to whether Petitioner was actually foreclosed from offering expert testimony on economic theories at the trial of this case, and, if so, whether this was a prejudicial error, were thoroughly reviewed by the Court of Appeals and decided in favor of

Respondents. Surely the correctness of these rulings have no special or general significance and are not cause for the United States Supreme Court granting certiorari (Rule 19).

The third alleged reason for granting the Petition is that the District Court committed error in ruling that Petitioner had not made out a *prima facie* case, and the Court of Appeals, in affirming, has created a *conflict* with decisions of the United States Supreme Court. Petitioner's allegation completely ignores the express recognition by the courts below of the correct rule of law to be applied to the facts. Judge Wollenberg's opinion stated:

> "On these motions plaintiff is entitled to and must receive the benefit of all favorable inferences which can be drawn from the evidence." (App. B to Petition, p. vi; a similar statement is made at the top of p. viii.)

Similarly, the Court of Appeals recognized that a motion for a directed verdict should be denied, unless the testimony and all the inferences which the jury could justifiably draw therefrom would be insufficient to support a different finding (Petition, App. A, p. 5). Thus, the Petitioner has had the benefit of an appeal and a thorough review of the action of the trial court by the Court of Appeals, which stated and applied the correct controlling legal principle. In this posture of the case, it may not fairly be said that the decision of the Court of Appeals *conflicts* (within the meaning of Rule 19 (b) of the Supreme Court Rules) with the United States Supreme Court cases cited by Petitioner.

Petitioner's fourth and last claimed reason is an alleged *conflict* between the decision of the Court of Appeals and the United States Supreme Court's decision in *Continental Ore Co. v. Union Carbide Co.*, 370 U.S. 690 (1962), which requires a "look at the conspiracy as a whole" (Petition

17). But, as is the case with the third alleged reason, *supra*, both the Court of Appeals and the United States District Court specifically recognized and applied the correct rule of law. Judge Wollenberg's opinion stated:

> "In reviewing separately the evidence relating to each of plaintiff's contentions, the court has not overlooked giving consideration to them in their entirety. The record as a whole has been reviewed and *whether plaintiff's charges are taken singly or collectively*, the conclusion is inescapable that no logical or reasonable inference of conspiracy between the defendants could be drawn." (Petition, App. B, pp. xv-xvi)

The Court of Appeals opinion not only applied the correct rule of law, *but cited and quoted the very case* with which Petitioner claims the conflict, as follows:

> "Parenthetically we deem it appropriate at this point to observe that, although we have set out and discussed *seriatim* the various business practices which plaintiff contends the defendants commonly followed, nevertheless *we have, in fact, considered them collectively* and our conclusion reflects a faithful adherence to the recent admonition of the Supreme Court that 'in cases such as this, *plaintiff should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each.' Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962)." (Petition, App. A, p. 5)

Thus, there is no *conflict* between the decisions of the Court of Appeals and the Supreme Court, within the meaning of Rule 19 (b); there is simply a conflict between Petitioner's unfounded, ill-starred hopes and the evidence in the case.

IV.

ARGUMENT

A. Kaiser's division of its limited supply of steel plate among its customers does not support an inference of conspiracy with other Respondents.

However variously phrased in the numerous and voluminous pleadings and oral presentations made by Petitioner over the years in the course of this protracted litigation, the only significant contention which it has made as to Kaiser is (a) that this Respondent, in the latter part of 1955, refused to accept all of Petitioner's orders for steel plate; (b) that in so doing (it is alleged) Kaiser consciously adopted a course of conduct parallel to that of the other Respondents; and (c) that this allegedly conscious and parallel conduct will support a reasonable inference that Kaiser conspired with the other Respondents to allocate steel (and possibly to monopolize the steel fabricating business). Contrary to the foregoing contention, *Petitioner's evidence* established that Kaiser, acting independently and in a manner different from that of the other Respondents, met Petitioner's requirements fairly, equitably and to the best of Kaiser's ability within its mill and product limits and subject to its own production problems. Because Petitioner's case is admittedly dependent solely upon hoped-for inferences, as distinguished from direct proof, (Petition, App. A, p. 5), we think it worthwhile to review Kaiser's steel supply record.

1. First Quarter 1955.

Petitioner's purchasing agent, Andersen, admitted that: (a) In the last quarter of 1954 and the first quarter of 1955 Kaiser's salesmen contacted him regularly and offered unlimited supplies of steel within the mill limits of Kaiser for early delivery. (R. 2163-2164); (b) During the fourth

quarter of 1954 Petitioner purchased *no steel* from Kaiser; (c) During the entire first quarter of 1955 Petitioner purchased only about *80 tons* from Kaiser (R. 2165); and (d) No failure on Kaiser's part to accept orders from Petitioner was claimed up to April 1, 1955.

2. Second Quarter 1955.

In mid-February, 1955, Kaiser told Andersen that the steel market was tightening up very rapidly, and that Kaiser was booked up on plate through June (R. 2168-2169, 2195, 2265).

In April Petitioner submitted its requirements on the Fourth and Main job involving 425 tons of plate (Ex. K-8, R. 2173, 4026-4027), and the Salinas River Bridge job involving 850 tons of plate (Ex. 23, R. 1776). Kaiser responded promptly and accepted for *August* production all the tonnage of plate on the two jobs that was within Kaiser's mill limits. The thanks that Kaiser received was the first registered letter or "suit order" (R. 2233) of May 17 calling for *June* rolling (R. 2181-2182, Ex. K-9, R. 2188-2189). After a written explanation of the production situation by Kaiser and a personal conference (R. 2192-2195), new purchase orders for both of those jobs, and an additional job, were prepared and accepted by Kaiser for August rolling (R. 2195; Ex. K-20, R. 2262, 4031-4032).

Thus, admittedly, as of June 30, 1955, there were no orders which had not been taken care of by Kaiser (R. 2209-2215).

3. Third and Fourth Quarters 1955.

Andersen testified that by mid-July he knew that the demand for steel was continuing to increase; that the predictions of both industry and government for the last half

of the year were that the demand was going to be greater than it had been in the first half; and that the demand for plate and wide flange steel would be particularly heavy (R. 2216). Confirming what Andersen knew about the critical and worsening general structural steel supply situation, on July 22d Kaiser told Andersen that Kaiser had run into trouble in keeping up on its plate orders, and that it would have to block out October in order to catch up (R. 2217). On August 4th Kaiser advised that it was booked up full on plate through November (R. 2223).

On two of the four jobs on which Petitioner contacted Kaiser from July 1st to November 28th, Petitioner, without explanation or cause, delayed six weeks after being awarded the jobs before requesting steel from Kaiser (R. 2220, 2225). Kaiser replied on August 10th with respect to the Fresno Bridge job that, as it had already advised Petitioner, "its plate schedules are completely filled through the month of November" (R. 2223). Thereafter that job disappears from the evidence; presumably Petitioner satisfied its requirements from other sources.

On the large Tulare County Court House job only a small part of the steel was plate, 133 tons (R. 1729), and Petitioner's tardy request of August 30th to Kaiser was limited to this tonnage (R. 2227). Kaiser was forced to advise the next day that it was booked full through November (Ex. 77; R. 1735, 2225-2226).

At this point in the chronology, Kaiser's mill operations came to a halt. A *wildcat strike* broke out on September 26th and shut the mill down through October 12th (R. 2228, 2234). Since a steel strike causes lost time in addition to actual days in which the mill is shut down (R. 1925-1927), the impact of this strike on Kaiser's ability to serve Petitioner or anyone else was far-reaching (R. 2240).

Following termination of the strike (and more "suit orders"), Kaiser advised Andersen and Petitioner's President, in a mid-November meeting, of the delays resulting from the strike and their effect on pending bookings, namely, that Kaiser was required to devote January to filling the orders which had been delayed during the strike. Kaiser offered to fit in 235 tons of plate for Petitioner in February. Petitioner accepted this offer and included in its purchase orders the plate for the Tulare County Court House job (R. 2237-2238).

On the Union Oil Building job Petitioner, on October 28th, submitted a general listing of the types and tonnages of steel required, amounting to 2,959 tons, only 103 tons being plate (R. 2249). On November 1st Kaiser advised Petitioner of the obvious fact that such a general list was of no help to Kaiser and could not serve as a basis for an order, and then requested that Petitioner submit the usual detailed bill of materials (R. 2250). As of the time suit was filed, Petitioner had failed to do this (R. 2253).

On the fourth and final job, Petitioner's Southern Pacific carframe job, which is given so much stress, Kaiser gave "job protection" (a practice not used by either of the other Respondents) to Petitioner and other bidders on the 18-inch ship-channel. This means that Kaiser agreed in advance of the bidding that it would furnish the steel to the successful bidder (R. 2452; for another instance of Kaiser job protection see R. 2455-2465) and, in fact, it accepted Petitioner's order in October, 1955 for 1,072 tons of steel for rolling commencing in January 1956 (R. 2240).

This is the record to November 28, 1955, when Petitioner filed suit, and there is no evidence proving anything against Kaiser.

4. U. S. Steel and Bethlehem.

The course of action followed by U. S. Steel and Bethlehem in the face of the steel shortage which developed in 1955 is summarized in the opinion of the Court of Appeals (Petition, App. A, p. 5-7), and may perhaps be more fully developed in the briefs of these Respondents. Suffice it to say that the methods of these Respondents in filling their customers' orders were not the same as, or in any way parallel to, Kaiser's.

5. Summary as to Kaiser's acceptance of Petitioner's orders in 1955.

When Petitioner's evidence relating to Kaiser from February 1st to November 28th, 1955, is analyzed, a number of over-all conclusions, each fatal to Petitioner's claims, are readily apparent:

a. Kaiser's commitments as to the quantities of steel which it would furnish to Petitioner and as to the rolling dates therefor were measured and determined solely by Kaiser's own internal production and scheduling problems.

b. Within the restrictions of its mill limits and subject to its rolling schedules and existing commitments, Kaiser accepted Petitioner's orders.

c. There is no evidence that the treatment extended to Petitioner by Kaiser was less favorable than that extended to any other customer. (In fact Petitioner has never even claimed any such less favorable treatment)

d. Most important of all, there is absolutely no evidence that Kaiser's handling and treatment of Petitioner's orders in the year 1955 was related to the conduct or activities of either of the other Respondents, to any conspiracy, or to any factors other than Kaiser's own production and steel supply problems.

B. Petitioner's collateral conspiracy contentions were completely without merit.

1. Vertical integration, which Petitioner admits is not *per se* illegal (Petition, p. 12), by Kaiser in February 1955 is not shown to have had any effect whatsoever on any act or policy of Kaiser. All of Kaiser's activities prior to February 1, 1955, received Petitioner's blessing, and there is no evidence of any change, after Kaiser entered the structural steel fabricating business.

2. Petitioner asserts (but never proves) that in 1955 there was a conspiracy between U. S. Steel and Bethlehem, and that it may be inferred that Kaiser joined it solely because of the following:

a. Kaiser entered the structural steel fabricating business (true);

b. Kaiser thereafter increased the amount of steel that it supplied to its Montebello plant in comparison with what it had sold to the former owners, Union Steel Company, allegedly constituting favoritism (false);

c. U. S. Steel and Bethlehem "favored" their structural fabricating plants (false);

d. Thus, Kaiser consciously engaged in parallel conduct with that of the other Respondents (false).

The opinion of the Court of Appeals demolishes the above argument with its findings that *none* of the Respondents favored their fabricating plants. The Court of Appeals further expresses its doubts as to whether an inference of conspiracy could be drawn from such normal business conduct as favoring one's own plants (Petition, Ex. A, p. 9). *Dipson Theaters, Inc. v. Buffalo Theatres, Inc.*, 190 F.2d 951 (2d Cir., 1951), *cert. denied*, 342 U.S. 926 (1952).

As to Kaiser, there were facts which could not be overlooked by the courts below, and compelled the finding that Kaiser had not favored its Montebello plant, including:

(i) Lack of competition between Montebello and Petitioner;

(ii) Late entry of Kaiser into structural steel fabricating;

(iii) U. S. Steel, a major supplier of Union Steel Company, dried up as a source of steel after the acquisition by Kaiser (Ex. 457C; R. 3497, 3999, 1581-1582);

(iv) Kaiser supplied less plate to its fabricating divisions (Montebello and two plants not engaged in structural fabricating) in 1955 than it had in 1954 (footnote to Ex. 458, R. 3498, R. 4001-4002; Ex. 462, R. 3502, 4002-4003). Actually, in 1954, a year in which Kaiser had Petitioner's blessing, it shipped three times as much plate to its fabricating divisions as it did in 1955 (*ibid.*);

(v) Montebello had a capacity of 48,000-60,000 tons a year (R. 2946), in comparison with which the shipments of plate, wide flange and structural shapes from all sources to Montebello in 1955, totaling 11,681 tons, appear quite modest (Ex. 457-C, supra);

(vi) Having in mind that Kaiser contributed 1,500,000 tons of steel to the western steel market per year (R. 1602), the shipment of 1,772 tons of plate to its Montebello plant in 1955 can give rise to no inference against Kaiser. (Kaiser had furnished larger quantities to the predecessor Union Steel Company in earlier years (Ex. 462, *supra*).

3. The spurious price uniformity argument of Petitioner is sufficiently answered by the Court of Appeals opinion (Petition, App. A, pp. 12-13).

4. The allegations of trading off of steel as to Kaiser are absurd. Kaiser was in exactly the same position as Petitioner regarding wide flange, Z bars and heavy plate—it had to rely on Bethlehem and U. S. Steel since it did not make the products. There is not the slightest evidence that the

purchase from Kaiser by Bethlehem and U. S. Steel of certain products (none of which are at issue in this case), which these Respondents did not make on the West Coast, was in any way related to Kaiser's purchases of lesser amounts of steel which it did not manufacture, or that there was any agreement or procedure for a "trade". The direct and uncontradicted testimony is that there was no such agreement or procedure (R. 1619).

5. Petitioner's wild dream that conspiracy should be inferred from "non-competition" of the Respondents, in the sense that they are not all engaged in each identical line of business on the West Coast, emphasizes the appalling weakness of Petitioner's case. Kaiser having undertaken four major expansion programs since its start in 1942 (R. 1602) can hardly be criticized, let alone said to conspire, because it has not yet been able to engage in every aspect of the steel business.

C. There was no proof of a monopoly nor an attempt to monopolize.

The loose charges of conspiracy to monopolize alleged in the complaint have never been substantial in this litigation. No attempt to prove a case of monopoly or attempt to monopolize was made; intent to monopolize was not shown, nor the size of the market, the participants therein, the market shares of the Respondents, or any evidence of any increase in shares, or a dangerous probability that monopoly would be accomplished. Petitioner has apparently abandoned its vague charge of conspiracy to monopolize, but in any event the conspiracy charges have already been disposed of in Section IV A and B. Further, the Petition makes no claim that Kaiser has a monopoly or has made an indi-

vidual attempt to monopolize (Petition, pp. 23-26). It would be an imposition on the Court to do so.

Petitioner, from the beginning, built its alleged conspiracy case by naming a group of the principal producers and then simply asserting that *they* (collectively) had a monopoly. To the extent that the producers manufactured similar products, this was alleged to be the result of a conspiracy to monopolize; to the extent that the producers made different products or acted differently, this was alleged to be a result of a conspiracy to restrain by dividing the market—"non competition". There was admittedly no direct evidence of a conspiracy to monopolize (Petition, App. A, p. 5), and the Court of Appeals properly and completely rejected all of Petitioner's monopoly charges (Petition, App. A, pp. 15-17).

D. Petitioner's remaining arguments have no merit.

Petitioner advances eleven numbered Arguments. Argument No. 1 relates to Section 10, the third cause of action, and Respondent U. S. Steel, and requires no response by Kaiser. Argument No. 2 on monopoly has already been answered in Section C, *supra*. Argument No. 5 relates to an alleged conspiracy among the Bethlehem companies, and requires no answer by Kaiser. Argument No. 6, relating to the admissibility of evidence prior to January 1, 1955, has no application to Kaiser because Petitioner claims no wrongful conduct as to Kaiser in such period (see Section II C). Argument No. 8, alleging error in compartmentalizing the testimony, has already been answered in Section III, *supra*. Argument No. 11 on the subject of inferences has, to the extent any answer is required, already been dealt with in Section III, *supra*. Petitioner's five remaining arguments will be given the summary treatment which they merit.

1. **Argument No. 3.**

Argument No. 3 alleges error concerning the deposition of Dr. Kreps. As already pointed out, the Court of Appeals has decided the legal question as to the general admissibility of expert testimony in an anti-trust case in favor of the Petitioner (thus eliminating any conceivable basis for granting a writ of certiorari). Further, as held by the Court of Appeals, any error that may have been committed was not prejudicial to Petitioner's case for the following reasons:

(a) At the time that the matter was presented to Judge Murphy, to whom the case had been assigned for pretrial and who died prior to the commencement of the trial, Petitioner had completed its direct examination of Dr. Kreps on deposition. The question before the Respondents was whether they were required to cross-examine Dr. Kreps on deposition, or thereafter be barred. The effect of Judge Murphy's ruling was to relieve Respondents of the obligation to cross-examine, and to indicate that discovery, at that stage of the proceeding, on an abstract economic theory was not appropriate. This was the only significance of Judge Murphy's order.

(b) Judge Murphy's order specifically recognized that if experts were needed during the trial the court might call them of its own motion. Petitioner never requested that the court call expert witnesses (and never offered the Kreps deposition, in whole or in part). Thus, it cannot complain.

(c) Petitioner's economic theories in this case, were thoroughly understood by everyone at all stages of the proceeding, since Petitioner's counsel, (R. 881-884, 900, 903, 917-918, 1032, 1036) and Petitioner's President (R. 2413, 2422) reiterated them *ad nauseam*. Thus Dr. Kreps' deposition, if admitted, could have added nothing to Petitioner's

case. Petitioner's counsel admitted that "*the economist* [Dr. Kreps] *merely described what anybody knows . . .*" (R. 1044).

2. Argument No. 4.

Argument No. 4 starts with an extended quotation from the Restatement of Torts on refusal to deal for purposes of monopoly and concerted refusal to deal and then follows with a number of boycott cases, in an apparent attempt to confuse the Court into thinking that Petitioner was boycotted. The fact is that there was no boycott of Petitioner by Kaiser or any Respondent and no refusal to deal. Petitioner's complaint is simply that it was unable to buy all of the steel that it wanted at a time when there was an intense steel shortage, and production, whether viewed nationally or in terms of individual Respondents, was unable to keep up with demand. There is not a shred of evidence that Petitioner did not get all of the steel that it wanted and needed for every job that it bid on and was awarded during 1955. The trouble was that Petitioner wanted *delivery* at times when Respondents, individually, were unable to physically roll and deliver the steel and/or supply Petitioner without giving Petitioner priority over other equally deserving customers. Thus, Petitioner had to wait for some of the steel.

As to the law, suffice it to say that the Court of Appeals applied the correct rule for a case such as this, where it is urged that an inference of conspiracy should be drawn from allegedly consciously parallel conduct. The Petition does not claim that the Court of Appeals misunderstood the term "refusal to deal" and Argument No. 4 is substantially irrelevant.

3. Arguments Nos. 7 and 9.

These Arguments, alleging error in the failure of the District Court to admit evidence of certain post-complaint acts and in the refusal of such court to allow the filing of a tardy amended and supplemental complaint offered on the eve of trial, are fully answered in the opinion of the Court of Appeals (Petition, App. A, pp. 26-28).

4. Argument No. 10.

Argument No. 10 on taxation of costs is not so much an argument as it is a complaint. Petitioner has abandoned its claim that Respondents' cost bill was untimely filed, this being Petitioner's principal point on appeal. With respect to Petitioner's secondary claim that the trial court erred in exercising its discretion in allowing certain costs, the Court of Appeals devoted four pages of its opinion (Petition, App. A, pp. 30-34) to this subject, and disposed of Petitioner's argument so conclusively as to eliminate any need for further comment by Kaiser.

V.

CONCLUSION

Petitioner continues to the end its eight-year-old course of wild unsupported factual and legal accusations. Petitioner has had its day in court, its case was carefully tried and meticulously reviewed by the Court of Appeals. Petitioner can make no claim of hasty or lightly taken action. It was given every opportunity during extended discovery, comprehensive pretrial, a month of trial, and the appeal to prove its case. It failed utterly to do so.

Petitioner commenced this lawsuit because it wanted to get more than its fair share of steel during periods of shortage, and, in effect, wanted to have unlimited amounts of

steel regardless of its effect upon others. Petitioner's failure to prove a case in the trial court was not affected in the slightest by the hazards, uncertainties, and vexations of litigation, or by any of the multitude of evidentiary rulings and other factors that go to make up the record in a protracted case. The fact is that Petitioner never had a case.

It is respectfully submitted that the Petition for Certiorari should be denied.

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ORIGINAL

Office-Supreme Court, U.S.
FILED
OCT 15 1963
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 446

INDEPENDENT IRON WORKS, INC., a corporation,
Petitioner,

vs.

UNITED STATES STEEL CORPORATION, BETHLEHEM PACIFIC COAST STEEL CORP., BETHLEHEM STEEL CO., KAISER STEEL CORP.,
Respondents.

Brief of Respondent United States Steel Corporation in Opposition to Petition for Writ of Certiorari

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Brief of Respondent United States Steel Corporation in Opposition to Petition for Writ of Certiorari

OPINIONS BELOW

The opinion of the District Court (R. 780-796; Appendix B to Petition) is reported at 177 F. Supp. 743. The opinion of the Court of Appeals (R. 4158-4191; Appendix A to Petition) is not yet printed in the official reports but will be reported in the Federal Reporter, Second Series, Volume ..... page .....

QUESTIONS PRESENTED

(1) Did the trial court and the Court of Appeals correctly hold that petitioner's evidence failed to establish a prima facie case under Sections 1 and 2 of the Sherman Act?

(2) Did the trial court and the Court of Appeals correctly hold that petitioner's evidence failed to establish a prima facie case under Section 10 of the Clayton Act?

(3) Did the trial court, as the Court of Appeals held, properly rule on the evidence and procedural matters presented by this record?

STATEMENT OF THE CASE

A separate statement of the case is necessary because petitioner's statement bears little resemblance to the facts presented by this case, facts which neither the court below nor the trial court found in any substantial dispute. Because the facts are carefully and thoroughly analyzed in the Court of Appeals' opinion as well as in the opinion of the trial court, we will here set them forth only in brief outline.

Proceedings Below

This is a private antitrust suit for treble damages brought by petitioner, a fabricator of structural steel, against respondents Bethlehem, United States Steel and Kaiser, who were the principal suppliers of steel to petitioner. Petitioner's chief claims are founded on Sections 1 and 2 of the Sherman Act; petitioner claims that respondents conspired in restraint of trade and conspired to monopolize and that each respondent individually monopolized and attempted to monopolize. In addition, petitioner claims that respondent United States Steel violated Section 10 of the Clayton Act. Despite their multiplicity, petitioner's claims all boil down to the same complaint: that during the steel

shortage that existed in the latter part of 1955, respondents Bethlehem, United States Steel and Kaiser failed to furnish petitioner with all the steel it wanted for use on certain fabricating jobs.*

Petitioner brought the present action for a narrow period of time—January 1, 1955 to the date of the filing of the complaint on November 28, 1955 (R. 683). As to matters subsequent to November 28, 1955, petitioner emphasized to the trial court that it intended to bring another and separate suit against respondents and wished to avoid res judicata as to possible damage claims for later periods of time (R. 683-684).

Extensive pretrial discovery was conducted by the parties, during the course of which petitioner stipulated to a list of some 28 fabricating jobs† bid or obtained by petitioner in 1955 on which petitioner claimed difficulty obtaining steel and on which it intended to rely in attempting to prove its case. Respondents accordingly limited their deposition discovery and their inspection of petitioner's records largely to the circumstances of those jobs.

After discovery was completed, a series of comprehensive pretrial conferences was held culminating in a pretrial order (R. 769) defining the issues in substantially the terms petitioner had proposed, incorporating the list of 1955 fabricating jobs on which petitioner predicated its case, limiting—generally along lines to which petitioner itself agreed

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*That there was a critical nationwide steel shortage during the latter half of 1955 certainly is beyond dispute. See Court of Appeals opinion, page 6. Yet the petition completely avoids any mention of this pivotal fact.

†The original list comprised approximately 42 jobs, but at petitioner's request certain of the jobs were eliminated either because petitioner no longer wished to rely on them or because they fell into the post-complaint period of time for which petitioner intended to bring a separate lawsuit (R. 684).

during the pretrial conferences—the number of other similar fabricating jobs that petitioner could bring in as cumulative evidence and making rulings on other matters of evidence that were briefed and argued during the pretrial conferences.

The case then came on for trial before a jury. Early in the trial the court ruled, without objection by any party, that petitioner should present first its evidence on liability, deferring evidence on the damage issue until later in the trial (R. 1305, 1560-1562). Petitioner rested its liability case after about a month of trial, during which petitioner presented testimony from 41 witnesses and introduced numerous documents in evidence. Much of petitioner's evidence was devoted to its steel purchasing problems on specific 1955 fabricating jobs and the steel purchasing problems of other independent fabricators. In addition, petitioner called as witnesses a number of officers and employees of each of the respondents, each of whom testified at length regarding his company's steel distribution policies and practices.

After the close of petitioner's case on liability, respondents moved to dismiss and for a directed verdict. The motions were fully briefed, extensively argued and were granted. As its written opinion shows, the trial court thoroughly and carefully analyzed the evidence, gave petitioner the benefit of every reasonable inference, yet found that petitioner's proof wholly failed to establish a prima facie case. The court could find no substantial conflict of fact; the truth of it was that the undisputed facts showed that petitioner simply had no claim.

On appeal the Court of Appeals likewise scrutinized the record with care, gave petitioner the full benefit of its proof as this Court advised in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), and again

found that the undisputed facts showed that petitioner had no case. As the court stated:

> "After a painstaking review of the voluminous record, consisting of over 4,000 pages of testimony and several hundred exhibits, we are fully satisfied and firmly convinced that plaintiff's entire case comes within the rule approved by the Supreme Court, that 'it is the duty of the judge to direct a verdict in favor of one of the parties when the testimony and all the inferences which the jury could justifiably draw therefrom would be insufficient to support a different finding.' *Baltimore & O. R.R. v. Groeger*, 266 U.S. 521, 524 (1925). Accord: *Gunning v. Cooley*, 281 U.S. 90 (1930); *Southern Pac. Co. v. Pool*, 160 U.S. 438 (1896)." (Opinion, page 5.)

Outline of Principal Facts

As a structural steel fabricator, petitioner purchased such steel products as structural shapes, plates and wide-flange beams and fabricated them into various structures such as highway overpasses and buildings. Petitioner purchased from respondents most of the structural steel required for its fabricating activities.

Although primarily producers of basic steel products, each of the respondents also is engaged in structural fabricating, which historically has gone hand in hand with steel production (R. 2673-2675). For example, United States Steel, through its American Bridge facilities, has been a structural fabricator since 1901. In 1948 United States Steel acquired fabricating facilities on the West Coast (see *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948)). However, through the years independent fabricating concerns have occupied an increasingly large share of the market, and the positions of respondents have declined (see, e.g., R. 4977). The great bulk of the basic structural steel

products produced by each respondent is and always has been sold to trade customers, including fabricators such as petitioner (R. 2533, 3999, 4023).

Demand for structural steel products fluctuates considerably from year to year, generally in response to market conditions in the heavy construction industry. The year 1955 saw the start of an unprecedented building boom and thus, despite the enormous increases in steel mill capacity during the decade since World War II (R. 2528, 2532), a critical shortage of structural steel developed in the middle of 1955.

Each of the respondents faced a demand for more steel than it could produce; the problem was to distribute the steel among customers in some reasonable businesslike manner. As petitioner's own purchasing agent acknowledged in his trial testimony, respondents met the problem in varied ways (R. 1419). Kaiser had no over-all distribution policy but reviewed individual orders and attempted to fill the most urgent ones first. Bethlehem at first had no rationing plan either, but later in 1955 adopted customer quotas for certain products manufactured in Bethlehem's Eastern mills based in a general way on purchases by customers in 1953 and 1954. United States Steel, at the outset of the shortage, developed a distribution plan setting up entry limits on its mills for the quantity of steel each customer might order (R. 2514-2515). The entry limits were determined as a matter of business judgment; one obvious factor considered was the amount of steel customers had purchased from United States Steel in the period before the shortage—1953, 1954 and the first six months of 1955 (R. 2615-2616). These entry limits were adjusted as much as possible to fit the specific needs of customers.*

*Of the approximately 24,000 mill customers of United States Steel in 1955 (R. 2533), one-fifth represented new customers taken on in 1954 and 1955 (R. 2600).

Each of the respondents continued to supply steel to its own steel fabricating facilities. The facts on this were developed in great detail at trial; and the evidence was clear that each respondent limited the amount of steel it furnished to its own fabricating facilities. The fabricating divisions or subsidiaries were treated substantially the same as trade customers. Thus United States Steel set up entry limits for its two fabricating divisions, American Bridge Division and Consolidated Western Steel Division. Both divisions complained of the inadequacy of these entry limits (R. 2716-2717, 3308) but received no adjustments. Both divisions operated at far less than capacity in 1955. Consolidated Western, for example, was able to operate at only approximately 30 per cent of capacity (R. 3290), had to decline to bid on many jobs, including at least one large underframe job amounting to 11,000 tons (R. 3292-3294, 4153-4154), and lost numerous other jobs because competitors were able to quote more rapid delivery (R. 4153-4154, 3299-3302).

Petitioner emphasizes the substantial quantities of steel that respondents made available to their own fabricating facilities and argues that this alone shows some sort of discriminatory treatment of petitioner. But as the Court of Appeals observed:

> ". . . isolated figures and unadjusted comparisons cannot support the asserted discriminations, and any illusions that they create are quickly dispelled, for it also appears that defendants' fabricating plants were much larger than the plaintiffs'; they carried on more extensive and varied operations than the plaintiffs' and their individual fabricating capacities were far greater. To illustrate: the 1955 plant capacity of U. S. Steel's Consolidated Western Division, whose receipt of 'huge tonnages' was repeatedly stressed by plaintiff,

> was estimated at 324,000 tons per year. . . . On the other hand, plaintiff's estimated capacity was 15,555 tons." (Opinion, page 9).

Petitioner itself successfully bid on, and actually booked, jobs in 1955 far in excess of its admitted plant capacity. Petitioner bid or quoted on some 174,041 tons of work and secured contracts for 19,733 tons, which was a record high for petitioner (R. 2412, 2416-2417). The bulk of these contracts were secured in the latter part of 1955 after the steel shortage had become acute and after petitioner was well aware that steel was in short supply (R. 1965-1966).

Petitioner then presented numerous orders to each respondent, calling for early delivery of large quantities of steel. Contrary to petitioner's pretrial assertions, the trial evidence showed that the great bulk of the orders was accepted, as each respondent bent every effort to fit the orders into rolling schedules to help petitioner out of its predicament. For example, in cross-examination petitioner's purchasing agent went through each order submitted to Bethlehem on the fabricating jobs petitioner complained about in this case and admitted that the orders were accepted and with a very few minor exceptions were filled by the agreed upon time (R. 2026-2129). United States Steel sold steel to petitioner over and above its entry limits and permitted petitioner to combine entry limits for various types of products in order to obtain larger quantities of items that petitioner needed urgently (R. 1973-1974, 4076). In the last half of 1955, when steel was short, United States Steel shipped 2,766 tons to petitioner (R. 4076) or a yearly average rate of 5,532 tons, more steel than petitioner ever had purchased from United States Steel before (R. 4056-4062).

Petitioner now seeks to single out and isolate its freight car underframe job for Southern Pacific Company as supposedly exemplifying petitioner's steel purchasing difficulties in 1955.* As required by Section 10 of the Clayton Act the job was awarded by Southern Pacific after competitive bidding in October, 1955. Four companies bid, including petitioner and Consolidated Western Steel Division of United States Steel (R. 2864-2866, 4113) and in accordance with Interstate Commerce Commission regulations, Southern Pacific submitted a report to the ICC detailing the basis for the award of the contracts. Petitioner obtained a contract for 500 underframes. This was the largest single contract obtained by petitioner in 1955, amounting to a total of 3,500 tons of steel, was bid at a time when petitioner knew it would have difficulty in obtaining steel and was bid by petitioner at 10 per cent below its estimated cost (R. 1965-1966, 3398-3399).

Approximately 45 per cent of the steel necessary for the underframe job comprised Z-bars, a type of structural shape specifically made for the construction of railroad cars. Although Bethlehem, United States Steel and other companies rolled Z-bars at Eastern mills, petitioner preferred to purchase them from United States Steel, which also rolls Z bars in the West, because these western Z-bars were somewhat less expensive.†

*Petitioner also makes a separate claim as to the underframe job under Section 10 of the Clayton Act, urging that Section 10 imposed a special obligation on respondent United States Steel to furnish petitioner with all the steel it needed for the job over and above petitioner's other steel requirements. We deal with this claim which the trial court and the Court of Appeals found devoid of merit, in the Argument, Part III, *infra*.

†However petitioner actually did purchase some of the Z bars for the job from Bethlehem (R. 1936) and large quantities of other steel needed for the job were purchased from Kaiser (R. 1935).

United States Steel tried to accommodate petitioner by offering to combine petitioner's entry limits for structural shapes and other Western-made steel products so that petitioner would have a larger entry limit for Z-bars. Petitioner refused this offer because it wished to use its entry limits to purchase steel for other jobs which did not require Z-bars (R. 1973-74).* United States Steel went on to furnish petitioner with steel over and above entry limits, and by the end of 1955 had shipped a large enough total tonnage of steel to petitioner to take care of the bulk of the underframe job, even without regard to the steel received by petitioner from other sources.

Thus neither United States Steel nor anyone else deprived petitioner of steel for the underframe job. Steel was made available to petitioner in substantial quantities in a period of shortage and there were no strings whatsoever attached to use of the material; it was, however, up to petitioner and every other fabricator, including the fabricating facilities of respondents, to adopt some reasonable manner of husbanding materials in short supply.

In brief, the evidence showed that a steel shortage developed in mid-1955, that each respondent necessarily had to adopt some method of distributing steel during the shortage, that, in fact, respondents acted independently and followed different steel distribution methods, that respondents

*The tabulation of alleged Z-bar entry limits on page 8 of the petition is inaccurate and misleading. As stated above, United States Steel at no time limited petitioner to 10 tons a month of Z-bars. Representatives of other independent fabricators who bid on the underframe jobs testified that when they bid they were satisfied that they could do the job with the steel available to them (R. 1702-1703, 2737-2738). The tabulation omits two other independent fabricators, ACF Industries, Inc. and Pullman-Standard Car Manufacturing Company, who bid on the underframe jobs and who had *larger* entry limits from United States Steel than did Consolidated Western Division of United States Steel (R. 3983-3984, 2638).

did not discriminate in favor of their own fabricating facilities, that independent fabricators continued to receive the bulk of the steel produced by respondents, and that in particular petitioner was treated fairly by respondents and received substantial quantities of steel from them. Such difficulties as petitioner experienced were due to the record quantity of jobs it booked during the shortage, solely upon the expectation that—at the expense of other fabricators—it could obtain all the steel it wanted.

ARGUMENT

The decision of the court below was clearly correct and raises no novel or important questions meriting review by this Court. Despite petitioner's scattergun citation of allegedly conflicting decisions of this Court and petitioner's random assertions of monopoly and conspiracy, this is simply a case in which petitioner's proof failed to support its claims and in which the court below applied normal and established rules in affirming directed verdicts for respondents. With respect to evidence questions which inevitably arose, as one might expect in a case of this nature, the court below applied well settled law in holding that the evidence was properly excluded by the trial court, or that the exclusion was without prejudicial effect. And as the Court of Appeals emphasizes, much of the so-called "evidence" to which petitioner now refers was not even offered (e.g. Opinion, page 24, n. 22).

The only conceivable respect in which this case differs from the commonplace is that petitioner urges a claim against respondent United States Steel under Section 10 of the Clayton Act, thereby raising the question whether Section 10 will support a private right of action for treble damages. But on the facts here presented, neither the court

below nor the trial court reached that question. Both courts held that *even assuming petitioner could sue under Section 16*, the evidence in this case utterly failed to make out a prima facie case of violation of the statute.

I. The Trial Court and the Court of Appeals Correctly Held that Petitioner's Evidence Failed to Establish a Prima Facie Case that Respondents Conspired in Violation of Sections 1 and 2 of the Sherman Act.

Petitioner's principal claim is that respondents conspired to restrain trade in violation of Section 1 of the Sherman Act or alternatively conspired to monopolize in violation of Section 2 of the Sherman Act. Petitioner does not claim there was any direct evidence of conspiracy. Rather, petitioner argues that an inference of conspiracy can be drawn from evidence of similar conduct. But the trial evidence did not show parallel conduct pointing to conspiracy, but instead affirmatively showed that respondents acted separately and differently, each on the basis of its own independent business judgment.

As we demonstrate in our summary of the facts above, the evidence showed without dispute that faced with a nationwide shortage of structural steel in mid-1955, each respondent was forced to adopt some method of distributing the steel it could manufacture among its customers, whose cumulative demand for steel exceeded productive capacity. Each respondent reacted to the shortage—of necessity—but each followed a different course of action. As petitioner's purchasing agent readily admitted (R. 1419):

> "Well, let me state at this time that 1955 was a very confusing year insofar as allocations, and various mills operated differently; . . ."

And as the court below stated with reference to the distribution methods adopted by each of the respondents, "these

methods do not evidence similarity; their variety strongly suggests individual action." (Opinion, page 7).

Petitioner claimed at the trial that each respondent grossly discriminated against independent fabricators such as petitioner and in favor of respondents' own fabricating facilities. But petitioner's trial evidence exploded any claim of discrimination. As the court below observed:

> ". . . no favoritism is apparent from the record. Defendants' plants were placed under restrictions equivalent to those imposed on the plaintiff. The restrictions were rigorously adhered to, even though they prevented defendants' plants from operating at anywhere near capacity. As a result the defendants were unable to bid or accept a number of jobs because of the scarcity of structural steel." (Opinion, page 9).

Petitioner claimed and still claims (Petition, page 14) that there was "price uniformity" as between respondents. But again petitioner's own evidence contradicted the claim, and showed affirmatively that there were very substantial price *variations* (R. 1457, 1534, 1942-1947, 1999, 3155-3156).

Petitioner claimed and still claims (Petition, pages 14-15) that respondents "traded off" steel and that this is something real competitors don't do. But petitioner's evidence showed no more than that for perfectly normal business reasons, respondents on occasion sold steel to one another (R. 1583-1589, 1622-1625, 3987, 3999, 4001-4004). Indeed, petitioner's purchasing agent admitted that petitioner itself had purchase and sale transactions with other local fabricators and that this was a "common practice." (R. 1920-1921).

Finally, petitioner claimed at trial and still claims that respondents do not compete in certain areas and "allocated certain lines to themselves and seem to be rather careful not to step on each other's toes." (Petition, pages 15-16).

Here again petitioner's assertions are without supporting facts. It certainly is true that United States Steel has warehouse facilities while Kaiser and Bethlehem have not, Bethlehem has ship building activities but United States Steel and Kaiser have not, and so forth. But there is absolutely no evidence, and petitioner points to none, that this business diversity was conspiratorial or anything but another example of what the facts show throughout this case: that each respondent at all times has acted independently in exercise of its own business judgment.

The court below and the trial court both correctly determined that after giving petitioner the benefit of every favorable inference which could be drawn from the evidence, there still was no fair or reasonable inference of conspiracy here, and that under well established law respondents were entitled to a directed verdict (Court of Appeals Opinion, pages 5-10; R. 793-794).

Petitioner complains that the court below failed to follow the admonition of this court in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962) that: "In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." In the sense that many of petitioner's assertions are, as we demonstrate above, disjointed and without any evident pertinency to any issue in the case, it is difficult to do anything but take the assertions up one by one. Nevertheless, it is abundantly clear that the court below not only said it was following *Continental Ore* (Opinion, page 5), but in fact did so. The court's opinion shows a careful consideration of the entire record as a whole, indeed a penetrating search for some possible favorable inference that might have given petitioner a prima facie case. But the inference was not there.

II. The Trial Court and the Court of Appeals Correctly Held that Petitioner's Evidence Failed to Establish a Prima Facie Case that Respondents Individually Monopolized or Attempted to Monopolize in Violation of Section 2 of the Sherman Act.

Again and again petitioner uses the words "monopoly" and "attempts to monopolize". Aside from its use of the terms as pure invective, petitioner evidently seeks to charge respondents *individually* with illegal monopolization and attempts to monopolize in violation of Section 2 of the Sherman Act. Thus petitioner argues that the evidence shows that United States Steel attempted to monopolize "the fabrication of railway car underframes" and that Bethlehem attempted to monopolize "the fabrication of multi-story buildings" (Petition, pages 24-25). The court below correctly held that petitioner's monopoly charges were wholly without substance (Opinion, pages 15-16).

The offense of individual monopolization under Section 2 of the Sherman Act requires as a minimum that the enterprise charged with monopolization must have attained "monopoly power" in an economically distinct market. *United States v. DuPont*, 351 U.S. 377, 389 (1956); *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 611-613 (1953); *United States v. Columbia Steel Co.*, 334 U.S. 495, 510 (1948). In the present case—despite petitioner's unsupported argumentative assertions—there was no evidence to show what constituted the total market for structural steel or structural fabricating in the Western states. There was no evidence to show the share of any respondent in any such Western market. There was no evidence to suggest that the position of any respondent was increasing. On the contrary, the only record evidence on the subject indicated that over the years the share of United States Steel and the share of Bethlehem in structural fabricating had substantially declined, that numerous new companies had entered the struc-

tural fabricating field and that other fabricators had taken an increasing share of the market (R. 4023, 4077-4078).

Taken as a whole, the evidence denied the existence of anything like individual monopolization by any respondent.

Turning to the claim that each respondent individually *attempted* to monopolize, it is well established that such alleged offense requires a showing of *specific intent* coupled with the *dangerous probability that monopoly will be accomplished*. *Swift & Co. v. United States*, 196 U.S. 375, 396 (1905); *United States v. Griffith*, 334 U.S. 100, 105-106 (1948).

Where it appears that a defendant's actions have been "predominantly motivated by legitimate business aims," there is no adequate showing of intent. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 626-627 (1953); *United States v. Columbia Steel Co.*, 334 U.S. 495, 533 (1948).

In its strained effort to twist its claim into an attempt to monopolize, petitioner argues, among other things, that there was evidence that United States Steel attempted to monopolize "the fabrication of railway car underframes" (Petition, page 24). The facts belie the charge. The evidence showed that Southern Pacific Company, in compliance with statute and Interstate Commerce Commission regulations, awarded a number of underframe contracts to Consolidated Western Steel Division of United States Steel because it submitted the most favorable bids and awarded another contract to petitioner for the same reason.* Concurrently, Southern Pacific awarded contracts for complete railway cars, including underframes, to ACF Industries, Inc., Pullman-Standard Car Manufacturing Company and

*Further facts regarding the Southern Pacific underframe jobs are set forth in point III of the Argument, *infra*.

other fabricators (R. 2888-2890). Southern Pacific's decision whether to buy complete cars or to buy underframes and assemble the cars itself depended upon relative cost and other factors (R. 2889). Southern Pacific Company, of course, was not the only railroad that was buying underframes or complete cars (R. 3296). The record does not indicate the extent of this business. But it does establish that in November, 1955 Consolidated Western Steel Division of United States Steel had to decline for lack of steel the opportunity to bid on 11,000 tons of underframes for Union Pacific Railroad (R. 3294-3295).

Thus, even assuming that railroad car fabricating is a business separate and distinct from other steel fabricating (an assumption not supported by the record), the facts fail to show United States Steel's position in that business — much less that any monopoly was "dangerously probable." Nor was there any evidence whatsoever of intent to monopolize or that United States Steel's conduct was actuated by anything other than normal business motives.

In summary, petitioner's monopoly claims, like the remainder of its case, proved to be mere accusatory generalities unsupported by fact or law.

III. The Trial Court and the Court of Appeals Correctly Held that Petitioner's Evidence Failed to Establish a Prima Facie Case that Respondent United States Steel Violated Section 10 of the Clayton Act.

Petitioner makes a separate claim under Section 10 of the Clayton Act (15 U.S.C. § 20) against respondent United States Steel. The gist of petitioner's claim is that Section 10 required United States Steel to supply petitioner (or any other competitive bidder) with all the steel necessary for the fabrication of railroad car underframes for Southern Pacific Company, and that unwillingness to supply peti-

manner with all steel wanted, when wanted, constituted a violation of Section 10.

Respondent United States Steel argued to the trial court that Section 10 would not support a private right of action because the administration of the statute is committed exclusively to the Interstate Commerce Commission, and the statute provides solely for criminal sanctions in proceedings to be brought by the Attorney General after investigation by the ICC. The trial court never reached that question, holding instead that the evidence failed to show a violation of the statute (R. 794-796). On appeal, the court below, also without expressing an opinion on whether a private suit could be brought under Section 10, held that the evidence showed no violation (Opinion, pages 17-18).

We submit that the decisions of the courts below as to petitioner's Section 10 claim are correct and raise no substantial question.

A. Section 10 of the Clayton Act Required that Southern Pacific Company Conduct Competitive Bidding on the Underframe Contracts and the Evidence Showed that the Bidding Was Conducted in Accordance with the Law.

Section 10 of the Clayton Act (15 U.S.C. § 20),* makes it unlawful for a common carrier to purchase from a corporation with which it has a director in common, unless the pur-

*In full text this section is as follows:

"No common carrier engaged in commerce shall have any dealings in securities, supplies, or other articles of commerce, or shall make or have any contracts for construction or maintenance of any kind to the amount of more than $50,000, in the aggregate, in any one year, with another corporation, firm, partnership, or association when the said common carrier shall have upon its board of directors or as its president, manager, or as its purchasing or selling officer, or agent in the particular transaction, any person who is at the same time a director, manager, or purchasing or selling officer of, or who has any substantial interest in, such other corporation, firm, partnership, or association, unless and except such purchases shall be

chase is made pursuant to competitive bidding and the "most favorable" bid is accepted. The section goes on to provide criminal penalties for any one who does any act "to prevent free and fair competition among the bidders or those desiring to bid . . ." The Interstate Commerce Commission has adopted detailed regulations covering the bidding procedures and the acceptance of bids. The carrier must make a report to the ICC on each transaction. 49 Code of Federal Regulations, Part 8.

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made from, or such dealings shall be with, the bidder whose bid is the most favorable to such common carrier, to be ascertained by competitive bidding under regulations to be prescribed by rule or otherwise by the Interstate Commerce Commission. No bid shall be received unless the name and address of the bidder or the names and addresses of the officers, directors, and general managers thereof, if the bidder be a corporation, or of the members, if it be a partnership or firm, be given with the bid.

"Any person who shall, directly or indirectly, do or attempt to do anything to prevent anyone from bidding, or shall do any act to prevent free and fair competition among the bidders or those desiring to bid, shall be punished as prescribed in this section in the case of an officer or director.

"Every such common carrier having any such transactions or making any such purchases shall, within thirty days after making the same, file with the Interstate Commerce Commission a full and detailed statement of the transaction showing the manner of the competitive bidding, who were the bidders, and the names and addresses of the directors and officers of the corporations and the members of the firm or partnership bidding; and whenever the said commission shall, after investigation or hearing, have reason to believe that the law has been violated in and about the said purchases or transactions, it shall transmit all papers and documents and its own views or findings regarding the transaction to the Attorney General.

"If any common carrier shall violate this section, it shall be fined not exceeding $25,000; and every such director, agent, manager, or officer thereof who shall have knowingly voted for or directed the act constituting such violation, or who shall have aided or abetted in such violation, shall be deemed guilty of a misdemeanor and shall be fined not exceeding $5,000 or confined in jail not exceeding one year, or both, in the discretion of the court. (Oct. 15, 1914, c. 323, § 10, 38 Stat. 734.)

The obvious purpose of Section 10 is to require competitive bidding when there is an interlocking director and thus insure that the carrier will get the best terms available. As this Court recently stated, Section 10 was enacted:

> "to prohibit a corporation from abusing a carrier by palming off upon it securities, supplies and other articles without competitive bidding and at excessive prices through overreaching by, or other misfeasance of, common directors, to the financial injury of the carrier and the consequent impairment of its ability to serve the public interest."

Minneapolis & St. Louis R. Co. v. United States, 361 U.S. 173, 190 (1959).

In the present case there is no question but that Southern Pacific Company was required on the underframe jobs to follow the competitive bidding procedures set forth in Section 10 and the pertinent ICC regulations. Consolidated Western Steel Division of United States Steel was a bidder on the jobs, and Mr. James B. Black was a director both of Southern Pacific Company and United States Steel.*

The evidence showed without dispute that Southern Pacific, in fact, did conduct competitive bidding and followed the applicable regulations without granting any favors to any bidders. Mr. M. C. Nystrom, Southern Pacific's general purchasing agent, testified at length as to each of the underframe contracts awarded by Southern Pacific from 1953 through 1955 (R. 2812 et seq.) and the pertinent documents from the files maintained by Southern Pacific on the jobs were introduced in evidence (e.g. R. 4113-4140).

During the period involved in this suit, there were four instances in which Southern Pacific received bids on car

*However, petitioner does not claim, nor does the evidence show, that Mr. Black had any personal interest in the underframe jobs or had anything to do with them (R. 2901).

underframes. The underframes were for delivery to Southern Pacific's Sacramento shops, where Southern Pacific itself planned to use the underframes in assembling complete railroad cars.* On the first two calls for bids—in early 1955, when steel was still in relatively plentiful supply—bids were received from several fabricators and the contracts were awarded to Consolidated Western Steel Division of United States Steel, as having submitted the most favorable bids. The reasons for each award were set forth in full in Southern Pacific's reports to the ICC (R. 2829-2832, 2914-2919, 4083). On the third call for bids, after bids from five fabricators were received for 1900 car frames, Southern Pacific elected to reject all the bids and call for bids on 1,500 car frames because its requirements had increased (R. 2833-2834, 2842, 2919). ICC regulations required a rejection and a new call for bids where there was any increase or decrease in the total quantity to be contracted for; such a rejection was not at all unusual (R. 2896, 2898-2899). On the fourth call for bids, there were four fabricators bidding, and Consolidated Western Division's bid was low, but Southern Pacific split the contract and awarded 500 underframes to petitioner and the remainder to Consolidated Western in order to have at least two sources of supply (R. 2864-2866). Again, the reasons for the award were set forth in a report to the ICC (R. 4113).

The facts as to the bidding procedures on each of the calls for bids were fully explored at trial. There was no evidence—and petitioner points to none—that the bidding was not conducted in strict accordance with law or that the bids accepted were not the most favorable to Southern Pacific. This should be dispositive of petitioner's claim under Sec-

*Concurrently, Southern Pacific also was purchasing complete cars from ACF Industries, Pullman-Standard Car Manufacturing Company, and other car builders (R. 2888-2890).

tion 10 of the Clayton Act, for everything the law requires was done and nothing in the record supports any claim that United States Steel committed any impropriety whatsoever in connection with the bidding. But petitioner further argues that respondent United States Steel's steel distribution policies, which petitioner claims deprived it of steel for the underframes, constituted a violation of Section 10. We deal next with this contention, which the courts below properly found was contrary to law and fact.

B. The Evidence Failed to Show that United States Steel's Distribution Practices in Any Way Violated Section 10 of the Clayton Act.

As we have demonstrated, petitioner booked a record total of 19,733 tons of fabricating work in 1955 (R. 2412, 2417). Petitioner's car underframe job for Southern Pacific was booked by petitioner in late fall and at the height of the nationwide steel shortage. Petitioner obtained a substantial quantity of steel for the job from Kaiser and Bethlehem (R. 1935-1936) but preferred to purchase the bulk of the necessary Z-bars from United States Steel, because it was the most economical source (R. 1533-1534).

Neither United States Steel nor any other steel company was able to accept all the orders tendered by customers in the latter part of 1955; demand exceeded productive capacity (R. 2145, 2169-2170, 2513, 3053-3064, 4010-4014). In an effort to distribute in a reasonable manner the steel it could manufacture, United States Steel had adopted entry limits for its customers and the record shows unequivocally that these entry limits were determined without regard to whether customers bid or did not bid against United States Steel's fabricating facilities (R. 2619-2620, 2631, 3014, 3413-3414). Petitioner wanted Z-bars for the underframe contract, and United States Steel offered to let petitioner

combine its entire entry limits for various Western steel products and apply them to Z-bars (R. 1973-1974). Petitioner refused, because it wanted to use the steel for other jobs which did not require Z-bars (ibid). United States Steel went ahead and furnished petitioner with steel over and above entry limits (R. 4076) and petitioner obtained steel from other sources (R. 4056-4062, 4018-4019, 4029-4030) amounting in total to much more than enough to handle the underframes. It was petitioner's own business how the steel was used, but petitioner chose to use the bulk of the steel on other jobs rather than for the fabrication of underframes for Southern Pacific.

It is in the face of this evidence that petitioner claims it was deprived of steel for underframes and that respondent United States Steel's steel distribution practices operated to "prevent free and fair competition" on the underframes in violation of Section 10 of the Clayton Act. In other words, petitioner isolates the underframes and asserts that regardless of anything else—petitioner was entitled to preferential treatment on those. The necessary thrust of petitioner's claim thus is that under the circumstances of this case, Section 10 required United States Steel, as a condition of bidding on the underframe jobs, to guarantee steel to any and all competitors who might wish to bid regardless of where they might be located, what their other sources of steel might be and how much other steel they already were using on other jobs, and even regardless of whether they could or would pay for the steel. This indeed would be a tortured construction of Section 10. As the Court of Appeals put it, such a construction of Section 10 "would engraft on the section the additional condition of cooperation between bidders." (Opinion, page 18). Neither the statute nor the regulations implementing it anywhere

contain provisions suggesting any obligations on the part of a supplier to deal with competing suppliers, to extend favors to them or to refrain from doing something in the normal course of business that somehow might hamper them. Nor do any of the reported decisions referring to Section 10* hold or even hint that such a construction would find any support in the statute or would be consistent with the purposes for which it was adopted.

We submit that the courts below properly held that petitioner's evidence utterly failed to establish any violation of Section 10 of the Clayton Act by respondent United States Steel.

IV. Rulings on Matters of Evidence and Procedure by the Trial Court Were Properly Affirmed by the Court Below.

Petitioner complains of a number of rulings by the trial court on matters of evidence and procedure, all of which were carefully reviewed and affirmed by the court below on appeal. Despite petitioner's wholly unwarranted characterization of these rulings as "compartmentalizing" the proof,

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Minneapolis & St. Louis R. Co. v. United States, 361 U.S. 173 (1959), affirming, 165 F. Supp. 893 (D. Minn. 1958), upholding Commission's order in *Toledo, Peoria & Western R.R. Co. Control*, 295 ICC 523 (1957); *Beegle v. Thomson*, 138 F.2d 875 (7th Cir. 1943); *In re Missouri Pac. R. Co.*, 13 F. Supp. 888 (E. D. Mo. 1935); *Regulations Relative to Bids of Carriers—Ex Parte No. 54*, 56 ICC 847 (1920); *Western Maryland Equipment Trust*, 111 ICC 434 (1926); *Automatic Train-Control Devices*, 112 ICC 259 (1926); *Construction and Repair of Railway Equipment*, 128 ICC 323 (1927); *Motor Bus and Motor Truck Operation*, 140 ICC 685, 733 (1928); *Securities of Western Pacific R. Co.*, 145 ICC 750 (1928); *Securities of Virginia Central Railway*, 154 ICC 437 (1929); *Codman v. Boston & Maine Railroad*, 157 ICC 552 (1929); *Greyhound Securities*, 25 MCC 365 (1939); *Pennsylvania, Ohio & Detroit R. Co. Bonds*, 254 ICC 473 (1943); *Wheeling & Lake Erie Ry. Co. Control*, 254 ICC 505 (1943); *Investigation of Practices of Norfolk S. Ry Co.*, 291 ICC 575, 628 (1954).

none of the rulings raises any important question, and none had any impact on the outcome of the case.

A. Petitioner's Assertions as to the Exclusion of Evidence Outside the Period Involved in this Suit Present No Question of Substance.

As we have demonstrated, petitioner brought this case for a narrow time period, from January 1, 1955 to November 28, 1955. Petitioner had released respondents Bethlehem and United States Steel from any claim petitioner might have had prior to January 1, 1955 and petitioner many times expressly stated that it had no claim against respondent Kaiser for matters occurring before 1955. Petitioner also indicated its wish to preserve its right to file a separate lawsuit for matters occurring after November 28, 1955. On the eve of trial petitioner shifted its position and sought to file a supplemental complaint bringing its claims up to date on certain specific fabricating jobs, but because the motion was tardy and concerned matters as to which respondents had not had discovery, the trial court in its discretion denied the motion (R. 773).

Thus at the trial the parties were concerned with matters occurring in 1955. But in addition, the court admitted pre-1955 evidence relating, among other things, to fabricating jobs prior to 1955 and to respondents' steel distribution practices and structural fabricating activities prior to 1955. Other pre-1955 evidence related to the purchases of steel by petitioner and other fabricators on specific jobs in the earlier years. Petitioner itself suggested that such cumulative evidence be limited to instances from 1950 on (R. 1206-1207) and to the local area (R. 1201); and voluntarily limited its list of individual instances to 9 jobs (R. 530-531). In the face of the cumulative and time-consuming exploration of collateral matters which all those jobs entailed, the trial court designated for trial purposes two representative jobs

on which petitioner had laid great emphasis (R. 777).* In so ruling, however, the court did not foreclose proof at trial of other jobs, provided petitioner could show relevancy and the need therefor (R. 1251-1252). No such showing ever was attempted.

Now petitioner belatedly argues that more of this evidence as to pre-1955 jobs should have been admitted, citing three additional jobs (Petition, pages 41-43). But even taking petitioner's description of the jobs at face value, they would have been nothing but collateral evidence calculated only to prolong the trial.

Petitioner's argument as to post-1955 evidence (Petition, pages 44-45), is even more obscure. The petition does not disclose what post-1955 evidence petitioner might have wanted to introduce. Nor did petitioner at the pretrial conferences or the trial ever make this clear, despite repeated suggestions from the trial court (e.g. R. 2360, 2362) that if petitioner wished to introduce certain evidence it should make definite unequivocal offers of proof, so that the court might have something concrete on which to rule. Admittedly, the trial transcript is replete with colloquy between court and counsel regarding the handling of the evidence as to the 30 or so fabricating jobs on which petitioner primarily relied to establish its case. In a general way petitioner indicated its desire to trace through certain of the jobs to their post-1955 conclusion in the attempt to show continued difficulties in purchasing steel and to show that petitioner sustained losses on some of the jobs. But petitioner's explanation for the possible relevancy of this sort of evidence was that it would bear on the issue of

*Despite petitioner's early dramatic claims for the pre-1955 jobs designated by the trial court (see R. 726, 735), the evidence as to these jobs was wholly anti-climactic and gave no support to petitioner's case. (See Opinion, page 19, footnote 18.)

damages (R. 921, 947, 1289-1290, 1559, 2878, 3543-3544). Thus, as the Court of Appeals properly held (Opinion, page 26), even if there had been an adequate offer of proof as to post-1955 evidence—which there was not—the offer was "limited to the damage issue, an issue never reached at the trial."*

B. The Industry Advisory Committee Documents Were Properly Excluded.

Petitioner argues at pages 38-41 of its petition that the trial court erroneously excluded the depositions of Houston (R. 3786), Halcomb (R. 3804) and Small (R. 3832) and certain "minutes" of a meeting of an industry advisory committee toward the end of World War II. Petitioner's treatment of this point is confusing and misleading in the extreme. The depositions never were offered in evidence, never were excluded by any pretrial order, or otherwise, and a reading of the depositions shows that petitioner never would have had the slightest desire to offer them in evidence, for they specifically disprove the very assertions that petitioner makes regarding the meeting of the industry advisory committee and an alleged statement at the meeting regarding a "voluntary allocation system" (e.g. R. 3825, 3856).

Petitioner, in fact, did seek to introduce the "minutes" or summary of the meeting and the trial court ruled that the document was inadmissible (R. 773).† Petitioner implies that the document was held inadmissible because it predated 1955. While the document certainly was remote

*Petitioner faced particular difficulty on the damage phase of its case, because its operations in 1955 concededly were profitable (R. 768-769).

†The minutes were not designated by petitioner as part of the record on appeal. However, rather than disregard petitioner's point on the appeal, the court below did inspect the document in the clerk's files (Opinion, page 22).

in time, the basic objection to it was that it was *inadmissible hearsay*: It was unsigned, there was nothing to show who prepared it; or when, or how, or whether the person who prepared it had personal knowledge of any of the matters stated therein. Under long settled authority, the court below held that the document properly had been excluded as hearsay (Opinion, pages 23-24).

C. The Testimony of Economists Was Not Excluded.

Several pages of the petition are devoted to a labored argument that the trial court improperly excluded testimony of economists (Petition, pages 27-31), a matter that was not raised at any time during the pretrial conferences or at the trial. A few months after this action was commenced, petitioner took the deposition of Dr. Theodore Kreps, an economist. Petitioner's counsel conceded that Dr. Kreps had no expert knowledge of the steel industry (R. 858). His deposition (R. 3547) consisted of generalizations on economic theory, assertions as to what "monopoly" and "competition" are, and the like. The deposition was ordered stricken by a judge other than the one who tried the case some three years later.

The order striking the deposition (R. 287), while expressing a distinct lack of enthusiasm for testimony as to "economic theories", specifically leaves open the possibility that an economist might properly testify at the trial. Yet petitioner never brought the matter of Dr. Kreps or any other economist up again—until the appeal. Nor does petitioner even now explain how the testimony of an economist would have made any difference here, except to suggest that as petitioner's witness, the economist might have invaded the province of judge and jury and given his opinion on the ultimate issues in the case (Petition, page 31).

Plainly, the court below was correct in holding that there was no erroneous exclusion of economic testimony.

D. Petitioner's Motion to File a Third Amended and Supplemental Complaint Was Properly Denied.

Petitioner's argument that it should have been permitted to file a third amended and supplemental complaint merits little comment.

The proposed third amended and supplemental complaint (R. 703) tacked on an additional four years of alleged wrong-doing by respondents, and purported to bring petitioner's damage claims up to the date of trial, at least on certain specific jobs. Even though the case had been pending for almost four years, petitioner did not move to file the supplemental complaint until shortly before trial and after discovery by the parties had been completed on pleadings pertaining to matters occurring during 1955. But in arguing the motion to file, petitioner's counsel stressed that petitioner wished to proceed to trial without postponing the matter to allow any additional discovery (R. 1165).

Petitioner's motion to file the third amended and supplemental complaint was clearly and inexcusably tardy. Permitting the complaint to be filed would have been seriously prejudicial in that respondents would have had no opportunity for discovery or trial preparation on the new issues opened up by the complaint. The trial court—as the court below held—was well within its discretion in denying the motion to file.

E. The Matter of Costs Was Properly Determined by the Courts Below.

The matter of costs is treated fully in the Court of Appeals' opinion (Opinion, pages 28-34) and presents no question worthy of review by this Court.

CONCLUSION

The decision below was correct, announces no new or important principles of law, and creates no conflict with any decisions of other circuits or this Court. The petition for a writ of certiorari should be denied.

Dated, San Francisco, California, October 14, 1963.

Respectfully submitted,

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